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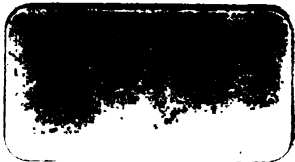
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THE
OHIO NISI PRIUS REPORTS

NEW SERIES. VOLUME XII.

BEING REPORTS OF CASES DECIDED

BY THE

SUPERIOR, COMMON PLEAS, PROBATE AND
INSOLVENCY COURTS OF THE
STATE OF OHIO.

VINTON R. SHEPARD. EDITOR.

CINCINNATI:
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1912.

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OHIO NISI PRIUS REPORTS

NEW SERIES—VOLUME XII.

CAUSES ARGUED AND DETERMINED IN THE SUPERIOR,
COMMON PLEAS, PROBATE AND INSOLVENCY
COURTS OF OHIO.

LABOR CONDITIONS FOR WOMEN.

Common Pleas Court of Franklin County.

EX PARTE ANNA HAWLEY.

Decided, October 7, 1911.

*Constitutional Law—Validity of Act Relating to Female Operatives—
Sale and Purchase of Labor—Freedom of Contract—Private Right
and Public Welfare—Contrariety of Decision, Owing in Part to
Changing Commercial and Industrial Conditions, Financial Cupid-
ity and the Blunting of High Purpose—102 O. L., 488.*

The act of May 31, 1911, relating to preservation of the health of females employed in manufacturing, mechanical, mercantile and other establishments, is not in derogation of the constitutional right of freedom of contract, nor is the classification arbitrary or the exemption unreasonable which is therein established, but the act is justified on the ground of public health, morals and the general welfare, and is valid and enforceable.

*Sheets, West & Game and J. L. Hampton, for Anna Hawley.
T. S. Hogan and C. D. Laylin, contra.*

DILLON, J.

By writ of habeas corpus the applicant seeks release from arrest, charged with violating the act of May 31, 1911 (102 O. L., 488). This act provides for a number of conveniences such as

chairs, suitable and separate toilet and dressing rooms, water-closets, ventilation, etc., for female employes. Among other things provided for in this act is the following:

"Females over eighteen years of age shall not be employed or permitted or suffered to work in or in connection with any factory, workshop, telephone or telegraph office, millinery, or dress-making establishment, restaurant, or in the distributing or transmission of messages more than ten hours in any one day, or more than fifty-four hours in any one week, but meal time shall not be included as a part of the work hours of the week or day, provided, however, that no restriction as to the hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods."

Violation of this provision by any employer is punishable by a fine of not less than twenty-five dollars nor more than two hundred dollars. The applicant through her counsel claims that the foregoing provision of said act is void and unconstitutional and bases this contention upon three propositions:

First, that the freedom of the right to contract both on the part of an employer and on the part of an employe, as well as the right to enforce such contracts, are guaranteed to all the people by Sections 1 and 19 of the Bill of Rights of the Constitution of Ohio and also by Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that any legislative act which limits this freedom of contract must fail, unless it shall appear to the court that such limitation is necessary for the public welfare, that is to say, for the protection of public health or safety or morals.

Second, that freedom of contract with reference to the sale and purchase of labor is as much protected as freedom of contract with reference to any subject or in any other respect.

Third, that the Legislature can not constitutionally make any arbitrary, artificial, fictitious or capricious classification so as to make an act apply to a certain person or persons engaged in some particular line of enterprise, while others coming within the same general class are exempt.

It is well settled law not only of this state but of all the states of the United States, that it becomes the duty of a court to de-

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termine whether or not an act in limitation upon individual rights or affecting individual property is to be justified on the ground that it is reasonably necessary for the protection of public health, safety, morals or general welfare. Succinctly stated, this simply means that all private right or property, liberty, etc., must yield to the general welfare.

Since, then, it is for the court to determine what is and what is not for the protection of the public health, safety, morals or general welfare, it is not surprising that we meet with much contrariety of decision. This variance is easily explained by a number of considerations. First, the age in which the decision was rendered, for it must be conceded that that which was not public welfare fifty years ago, under the then conditions of society, morals, necessities, and commercial conditions, may in this present age be considered public welfare. At a time when most people of this country worked for themselves and industrial conditions were such that few women were engaged in labor in factories, workshops, etc., it might easily be said that there was no public necessity or need of any legislation limiting the hours of their labor. At the present day, happily or not, few men work for themselves and large industrial institutions have multiplied so that a large percentage of our people, both men and women, are compelled by industrial conditions to labor for others, and, therefore, public health, public welfare, public morals, as well as public safety, demand that these conditions be recognized as existing and decision be not rendered upon the bare, naked questions of purely private right.

This contrariety of decision also varies with the individual judge who interprets statutes in different parts of the country as well as in different ages. Judges differ as to their standard of ethics as well as to their views as to what constitutes public welfare.

It is not a yielding to any erroneous clamor of the day to observe that this nation has passed through an era of the greatest commercial and financial cupidity in the history of the world, and the inordinate competition and desire for commercial success has threatened to blunt the higher and more sacred objects of living.

Coming now to some of the decisions, one of the strongest cases which has been cited to this court in behalf of the invalidity of this law comes from our own state in the case of *Palmer v. Tingle*, 55 O. S., 423, and yet that case I consider easily distinguishable from the one at bar. In that case the Supreme Court held that the inalienable right of enjoying liberty and acquiring property, which is guaranteed by the first section of the Bill of Rights of the Constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are necessary for the common welfare. Further, that the judgment of the General Assembly as to whether restraint of private right and the right to contract was for the general welfare was not conclusive, but that the court must see that it is for the general welfare. In that case the court considered that the act of April 13, 1894, giving a lien on the property of the owner to sub-contractors who had no contract with him was unconstitutional and void, and yet the general principles on which this case is decided here were announced in that case.

Again, in our own state the case of *City of Cleveland v. Clements*, 67 O. S., 197, is cited, in which the act of April 16, 1900, limiting the hours of daily service of workmen and mechanics employed upon public works or work done for the state of Ohio, or any municipality thereof, to eight hours a day, was not for any public welfare, public health or public morals, and, therefore, was unconstitutional and void.

In the year 1895, the Supreme Court of Illinois in the case of *Ritchie v. People*, 155 Ill., 98, held, emphatically, that the right to labor or employ and to make contracts in respect thereto, upon any terms as might be agreed upon, was a liberty and property right under the Constitution, and, therefore, a statute prohibiting women from working more than eight hours a day was unconstitutional. This decision of 1895, however, is completely modified and distinguished, if not practically overruled, in the case of *Ritchie & Co. v. Wayman*, 244 Ill., 509, where the court held that property rights may always be limited and regulated under the police power of the state when the public health, safety, morals and welfare so required, and, therefore, that the Woman's Ten Hour Law of 1909 was a valid regulation.

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The oldest case sustaining the validity of laws like the one in question here was decided by the Supreme Court of Massachusetts in 1876 in the case of *Commonwealth v. Hamilton*, 120 Mass., 383, wherein an act of that state prohibiting the employment of all persons under the age of eighteen and of all women from laboring in any manufacturing establishment more than sixty hours per week was valid.

The state of Nebraska in 1902 speaks to the same effect in the case of *Wenham v. State*, 65 Neb., 394, wherein the act of that state to regulate and limit the hours of employment of females in manufacturing, mechanical, and mercantile establishments, etc., was held to be valid on the ground that private right must yield to public welfare.

To the same effect is the case of *State v. Buchanan*, 29 Wash., 602.

The Supreme Court of the United States has spoken at least twice upon this question, the first time apparently adversely to the decision here rendered, in the case of *Lochner v. New York*, 129 U. S., 45, where it was held that the right to make a contract in relation to one's business is a part of the liberty protected by the Fourteenth Amendment, and this included the right to purchase and sell labor, and that there was no reasonable ground on the score of public health, etc., for interfering with the liberty of the person or right of free contract by determining the hours of labor in the occupation of a baker. This law applied to employes generally in bakeries, but this case is distinguished, if not practically much modified, in the later case of *Muller v. State of Oregon*, 208 U. S., 412, decided in 1908, in which the court held the Oregon statute constitutional. This statute provided that no female should work in certain establishments more than ten hours a day. The particular case was one in which the employment was in a laundry, and the discussion of the court in that case is referred to and adopted here as a part of this decision. And as the Supreme Court of the United States did in that case, this court also takes judicial cognizance of matters of general knowledge such as the fact of woman's physical structure, and that the performance of maternal functions places her at a disadvantage, which justifies a difference

in legislation in regard to some of the burdens which rest upon her. Healthy mothers are essential to vigorous offspring and the physical well-being of woman is an object of public interest and welfare. The regulation of her hours of labor, therefore, falls within the police power of the state, and a statute directed exclusively to such regulation does not conflict with due process of law or equal protection clauses of the Fourteenth Amendment. The said court further held that it was the right of a state to regulate the working hours of women.

Only a year ago the Supreme Court of Michigan in the case of *Withey v. Bloem*, 163 Mich., 419, held constitutional the statute of that state providing that no females shall be employed in any factory, mill, store, shop or warehouse more than ten hours in any one day or fifty-four hours a week, and as also pertinent here, that same case holds that the exemption of women who work where perishable products are preserved did not invalidate the act on the ground of class legislation.

The act in question here exempts canneries and the cases where perishable goods are being handled. These two occupations are but temporary and not permanent, and the necessity for such exemption makes the same reasonable.

The Ohio act involved here applies to any factory, workshop, telephone or telegraph office, millinery or dressmaking establishment, restaurant or the distributing or transmission of messages. It may be that judicial decision later on may discover some mercantile establishment not included in the foregoing, and it may be a question whether it does include every mercantile establishment which ought to be in the act, yet I am not inclined to strike down the law upon such speculation. If the law needs broadening, it will be better to sustain it and permit its correction in due season as its interpretation may suggest.

The act, as I interpret it, does not seem arbitrary and capricious. Nor does it seem to have been enacted for the purpose of hampering one class of employers and in favor of another class. The classification is not artificial as claimed. The act seems in good faith to attempt to reach all cases where the remedy was needed. The number of hours of the limitation are reasonable in this day and age. The restrictions upon the laboring woman

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with reference to her hours of contract are not absolute, and apply only to her employment at the same place. She may do as she pleases with her work and labor after those hours are covered.

I am of opinion, therefore, both upon authority and principle, that the act is not unconstitutional, and the applicant, therefore, must be remanded.

WORKMAN KILLED BY BEING KNOCKED OFF A WALL.

Common Pleas Court of Hamilton County.

FLOYD C. WILLIAMS, ADMINISTRATOR, v. ISAAC BISHOP ET AL.

Decided, June 27, 1911.

Negligence—Derrick Collapses and Workman is Knocked from a Wall—Inherent Danger as Affecting Liability of Owner and Principal Contractor—Collateral Negligence of Independent Contractor Removing Wall—Assumed Risk—Granting of Remittitur Not Likely to Terminate Litigation.

1. Whether the work of taking down a wall ruined by fire was inherently dangerous is a question of fact for the jury.
2. The holding of the Supreme Court in the case of *Bridge Co. v. Steinbrock*, 61 Ohio St., 250, does not permit of the arrest of a case from the jury on the ground that the accident was not due to inherent danger from the condition of the wall upon which the decedent was employed, but was the result of the collateral negligence of an independent contractor.
3. A workman employed in taking down a wall can not be held to have assumed the risk arising from a defective derrick, where it does not appear that he assisted in constructing the defective portion of the derrick.

Littleford, James, Frost & Foster, for plaintiff.

E. S. Aston and Prescott Smith, contra.

GORMAN, J.

This is an action to recover damages for the death of Charles Baumann for the alleged negligence of James Griffith & Sons

Company, builders. The action was brought against Isaac Bishop, James Griffith & Sons and the Thomas Y. Gaff Estate. Baumann was a rigger employed by Bishop, a wrecker of buildings in this city. Bishop was employed by Griffith & Sons, and Griffith & Sons employed by the trustees of the Gaff Estate to partly take down and rebuild the building on the north side of Fourth street, known as the Freiberg Building, which had been partly destroyed by fire. The west wall of the building had fallen in, the roof and the floors had been burnt out for a height of six stories and the front wall was left standing perpendicular and plumb, but without any lateral support. Griffith & Sons were independent contractors, the Gaff Estate having reserved no control or direction over the work to be done. Bishop was an independent contractor under Griffith & Sons in taking down part of the building, but was not to rebuild any portion of it. In taking down a part of the wall Bishop employed a derrick which was anchored to the building adjoining the Freiberg Building and known as the Moyse Building. It was claimed that this derrick was defective in this particular, that there was a goose neck or iron strap which held one of the stiff legs to the sill of the derrick, there being two stiff legs and one mast constituting the upright portion of the derrick. In one of these stiff legs there was but one bolt, three-eighths or three-fourths of an inch in diameter, whereas it was intended, and there were places for three bolts. While lifting a stone from the coping of the wall fronting on Fourth street this derrick collapsed and the only bolt which was holding one of the stiff legs of the derrick was sheered off, thereby allowing the derrick and the mast and the other stiff leg to fall over into the burned building, and in so doing it struck Baumann, who was on the wall working with the derrick, throwing him into Fourth street and killing him.

The basis of the plaintiff's claim of his right to recover for the death of the decedent is that the work was inherently dangerous and that as a consequence thereof neither the owner nor the contractor, nor a sub-contractor could be relieved from liability on account of negligence in the doing of this work.

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Before going to trial; upon the motion of Bishop and the Gaff Estate; the plaintiff elected to pursue Griffith & Sons and consented to the dismissal of the Gaff Estate and Bishop from the case.

Upon the trial of the case to a jury on the issues joined a verdict of \$2,500 was returned in favor of the plaintiff, administrator. A new trial is asked, principally on four grounds:

First. That the work of taking down this wall was not intrinsically or inherently dangerous, and therefore neither the Gaff Estate nor Griffith & Sons would be liable to the plaintiff even though there was negligence in the construction of the derrick because Bishop was an independent contractor and unless the work was inherently or intrinsically dangerous the rule of *respondet superior* applies.

Second. That the evidence shows that the plaintiff's decedent, Baumann, was guilty of contributory negligence in remaining on the wall after being ordered off by Bishop, his employer, and incidentally that he assumed the risk inasmuch as it was one of the dangers incident to the business.

Third. That the death of the decedent was not the result of the inherent or intrinsic danger of the wall or the work of taking it down, but was the result of collateral negligence.

Fourth. That the damages awarded by the jury are excessive.

It was admitted by counsel for defendant that if the wall was inherently or intrinsically dangerous or the taking down of the wall was intrinsically or inherently dangerous, then the owner of the property and Griffith & Sons could not escape liability for any negligence of Bishop in taking down the wall, even though Bishop was an independent contractor. The court submitted to the jury the question of fact, whether or not the wall was inherently or intrinsically dangerous, and also the question of fact whether or not the taking down thereof was intrinsically or inherently dangerous. The court believes that this was the proper course to pursue in reference to this case and that the question of intrinsic danger or inherent danger of the wall, or the work, were questions of fact not to be determined by the court, but by the jury under all the evidence and the circumstances of the case.

The court believes that the case of *The Cincinnati & Covington Bridge Co. v. Steinbrock*, 61 Ohio St., 250, must control in this case. Whatever may be the decisions in other states it would seem that our Supreme Court in the case just cited has held that a ruined wall after a fire is intrinsically and inherently dangerous, and that the liability for negligence in taking it down can not be shifted by the owner of it onto an independent contractor or sub-contractor. It is true that there are cases in other states which appear to hold a contrary view to that expressed in the Steinbrock case, to-wit: *Engel, Admr., v. Club*, 137 N. Y., 100; *McCaffery v. Railroad Co.*, 61 N. Y., 178; *King v. Railroad Co.*, 66 N. Y., 181; *Harkins, Admr., v. Sugar Refining Co.*, 122 Mass., 400; *Schip v. Pabst Brew. Co.*, 64 Minn., 22; *Reilly v. C. N. W. Ry Co.*, 122 Iowa, 525.

The court feels, in view of the decision in the Steinbrock case, that he is bound to hold that under the most favorable view to the defendants, the question of whether or not the wall was dangerous and the taking down thereof intrinsically dangerous, were questions of fact to be submitted to the jury. Upon these questions the jury have found against the defendant and the court is not disposed to disturb the verdict on that ground.

It is urged that Baumann was guilty of contributory negligence by being on the wall after being ordered to remain off by Bishop, his employer. It was necessary for Baumann to be on the wall in the prosecution of the work assigned to him. There was evidence tending to show that Bishop ordered all the men to get off the wall whenever a strain was to be taken by the derrick, but there was also evidence tending to show that Christy, the foreman, ordered the men, including Baumann, to remain upon the wall and do the work which was assigned to them in manipulating the derrick. The jury under the evidence might well have found that Baumann was not guilty of contributory negligence.

It is also urged that Baumann knew the danger and that this danger was incident to the employment and that he, in contemplation of law, assumed the risk of this danger. The court is of the opinion that Baumann did not assume the risk of a defective derrick, especially inasmuch as it does not appear clearly from

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the evidence that Baumann assisted in constructing this part of the derrick which was defective, the stiff leg, the goose neck and the bolt. In this connection it may not be amiss to say that the court is not in sympathy with the rule of law which holds that the employe assumes all the risks incident to his employment, and would not apply this rule, unless it was one which clearly falls within the decisions of this state. The court does not feel that the evidence in this case establishes the fact that this was one of the risks incident to Bauman's employment which he assumed when he went to work for Bishop.

And next it is urged that the injury was the result of collateral negligence, and did not grow out of the intrinsic or inherent danger of the wall of the work of taking it down. The court is very much impressed with this claim, and were it not for the Steinbrock case, would be disposed to set the verdict aside on the ground that the giving way of the derrick which caused the death of Baumann, was a collateral incident or circumstance and collateral negligence connected therewith for which neither the Gaff Estate nor the contractor would be liable. The defendant's contention as to this feature of the case is strongly supported by the case of *Schipp v. Pabst Brewing Company*, 64 Minn., 22.

It appears to the court that the accident did not grow out of the condition of the wall, but it grew out of the negligent construction of the derrick, something collateral to the wall, but in view of the language employed by the Supreme Court in the Steinbrock case, the court does not feel now and did not feel when the motion was made to arrest the case from the jury at the close of all the testimony, that the plaintiff was not entitled to recover. Without undertaking to quote all of the language of the Supreme Court in the Steinbrock case, it will be sufficient to say that it appears to the court to bear out the contention of the plaintiff that the defendant is liable. On page 222, the Supreme Court, quoting from the language of Cockburn, Chief Justice, in *Bower v. Peate*, this language occurs:

“That a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his

neighbor must be expected to arise, * * * can not relieve himself from liability," etc.

And again on page 224, the court says:

"It is the danger to others incident to the performance of the work let," etc.

And again on page 227 the court says:

"And taking them down (walls) would necessarily be attended with danger to others."

This seems to be broad enough to include the case of an employe or servant of an independent contractor, although the court believes that if it were not for this decision he would be warranted in holding that the death of the decedent was the result of collateral negligence, for which the superior, Bishop, would alone be liable.

It is urged that \$2,500 damages are excessive. This sum is certainly not a large amount for the value of a human life, if the defendant is at all liable. The jury were charged, and correctly so, that they were at liberty to fix any sum that they might desire as the value of the plaintiff's damages by reason of the death of the intestate not to exceed \$10,000, the limit fixed by the statute. They were also instructed that they could take into consideration not only the pecuniary money value that decedent was to the mother, but they could take into consideration his value to her as an advisor and comforter and other elements that have been held to be proper to be considered by the jury in fixing the amount of damages.

The court is not disposed to make a remittitur of damages, because as a rule such remittitur inures to the benefit of the defendant and militates against the plaintiff without, as a rule, resulting in terminating the cause of action. It was peculiarly the province of the jury to fix the amount, and while the court might feel that the damages were more than he would have awarded, it must be borne in mind that it is not the province of the court to fix the amount of damages, but that it is peculiarly the right of the jury to do so.

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In view of all that has been said, the court is of the opinion that the motion for a new trial should be overruled. If the higher court should hold that the evidence shows that the death of Baumann was the result of collateral negligence, or that the doctrine which holds the owner or the contractor liable when the work is inherently dangerous, does not extend to a liability to the servants of an independent contractor, then this case is in such shape that it can be quickly disposed of. Motion for a new trial overruled.

NEW SECRET SERVICE LAW INVALID.

Common Pleas Court of Franklin County.

THE STATE OF OHIO, EX REL CHARLES E. MCGANNON, v. FRED M. SAYRE, AS AUDITOR OF FRANKLIN COUNTY, OHIO.

Decided, October, 1911.

Constitutional Law—Secret Officer for Prosecuting Attorney—Section 2615-1 Inoperative and Section 1541 Remains in Force—Uncertain Meaning of the Term "Presiding Judge."

Section 2915-1 of the General Code, providing for the appointment of a secret service officer by the prosecuting attorney, is inoperative and void for the reason that it is impossible to determine what judge or officer is designated by the statute to fix the compensation of such appointee; and inasmuch as it can not be supposed the Legislature would have repealed the existing act providing for the appointment of such an officer without providing a substitute therefor, and these acts so far as the attempted amendment, supplement or repeal are concerned relate to a single subject, Section 1541 remains in force.

RATHMELL, J.

Relator sues for a writ of mandamus commanding Auditor Sayre to deliver him a warrant for payment of \$62.50 for services as secret service officer. He alleges his appointment by the judges of the Common Pleas Court of Franklin County; and also his appointment by the prosecuting attorney of said county and the fixing of his compensation. His salary was fixed by

said judges January 1st, 1909, at \$1,500 per annum; and on April 29th, 1911, by the presiding judge of the third subdivision of the fifth judicial district at same rate. He avers that on September 1st, 1911, having performed the services to which he was appointed, the auditor refused to issue him a warrant upon his voucher duly approved by one of the judges of this court.

The answer admits the averments of the petition except the alleged authority of the presiding judge of the third subdivision of the fifth judicial district to fix the compensation of relator as alleged, and joins issue as to the authority of the said presiding judge to act under Section 2915-1, General Code (O. L. Vol. 102, p. 78), on the ground that the same is inoperative and void.

The case involves the construction of Section 2915-1 of the General Code found in Vol. 102 O. L., pp. 77 and 78.

Section 2915-1 is as follows:

"The prosecuting attorney may appoint a secret service officer whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. The compensation of said officer shall be fixed by the presiding judge of the court of common pleas of the subdivision of that judicial district and shall not be less than one-fourth nor more than one-half of the official salary of the prosecuting attorney per year, payable monthly, out of the county fund, upon the warrant of the county auditor."

It is contended this section is inoperative because it is impossible to ascertain what judge or officer was meant by the Legislature in the use of the words "*presiding judge of the court of common pleas of the subdivision of that judicial district.*"

Can it be ascertained by the application of the rules of statutory construction what the Legislature intended by the use of the words just noted?

It is fundamental that when the words of a statute are plain, explicit and unequivocal a court is not warranted in departing from their obvious meaning although from considerations arising outside the language of the statute it may be conceived that the Legislature intended to enact something different from what it did in fact enact. (*Woodbury & Co. v. Berry*, 18 O. S., 456.)

The state is divided into nine common pleas districts; and

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these with the exception of Hamilton county, which constitutes one district, are each divided into three subdivisions. The judges are officers for the entire district, but are elected by the electors of a subdivision of the district in which they reside.

The law provides that the judges of the common pleas court in each common pleas district shall designate a *supervising judge* for certain purposes.

There is thus provided a *supervising judge for a common pleas district*; but we know of no provision in law for a presiding judge of a subdivision of a common pleas judicial district.

It is urged that the "supervising judge of the district" is meant by the term "*presiding judge*."

The rule that the plain, explicit, unequivocal words "*of the subdivision of that judicial district*" used to describe the officer whose duty it is by the statute to fix the compensation of the secret service officer, apparently forbids departing from their obvious meaning. The language of the section specifies "*subdivision*" and not the "*district*" and excludes such officer; for the Legislature is held to mean what it has plainly expressed.

It is contended further that in this subdivision by established custom there is such an officer referred to in the statute as attested by the appointment of the relator. In this, the third subdivision of the fifth judicial district, where there are six judges of the court of common pleas, it has been the practice for years, as a matter of convenience, to name a presiding judge, and this custom may prevail in a few subdivisions similarly situated. But it is not contended that in a very large number of the subdivisions of the common pleas judicial districts of the state there is any such practice or custom, and from the facts and circumstances of the case this can not be; and if that be the official intended by the statute to fix the compensation of the secret service officer, then the law would be void because lacking in uniform operation throughout the state.

Again it is suggested that the Legislature by the words, "*presiding judge of the subdivision*," meant "*any judge that happened to be on the bench in that subdivision*," or is equivalent to, "*the judge of the court of common pleas of the subdivision of that judicial district presiding (in that or the county)*."

These suggested constructions of the intent of the law still leave indeterminate the officer whose duty it is to fix the compensation of the secret service officer; and call for transposition and interpolation of words. In a number of subdivisions several judges are on the bench presiding in their respective courts, and who can determine which one is designated. And as to equivalent meanings, in *Slengluff v. Weaver*, 66 O. S., 621, 627, the court quotes with apparent approval *McClusky v. Cromwell*, 11 N. Y., 593, where it is observed that "the office of interpretation is to bring sense out of the words used and not bring sense into them."

Upon consideration of the able arguments made and authorities cited in this case we are of opinion that the Attorney-General is correct in his contention that this section of the General Code in question is void and inoperative for the reason that it is impossible to ascertain what judge or officer is meant by the statute whose duty it is to fix the compensation of the secret service officer.

While the law in question repeals Sections 1541, 2916, 6184, 6185 and 6186 of the General Code, these sections still remain in force and effect since we can not suppose that the Legislature would have repealed the acts providing for the employment of a secret service officer without providing a substitute therefor—the acts so far as the attempted amendment, supplement and repeal are concerned relating to a single subject. Section 1541 of the General Code remaining in force, under the facts recited in the petition, the relator is entitled to the writ of mandamus prayed for under his appointment of January 1st, 1909. Writ allowed.

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Bryson v. Briggs et al.

REMAINDERMEN WITHOUT RIGHT TO PARTITION.

Common Pleas Court of Marion County.

EMMA E. BRYSON V. CHARLOTTE BRIGGS ET AL.

Decided, May Term, 1911.

Partition—Does Not Lie Where There is an Outstanding Life Estate in the Whole Tract—Meaning of Partition—Section 12029.

The right to immediate possession is essential to the right to partition.

A remainderman, therefore, is not entitled to partition, notwithstanding the owner of the intermediate estate consents thereto.

Copeland & Bartram, for plaintiff.

Jacoby & Donithen, contra.

DUNCAN, J.

Demurrer to petition.

The plaintiff seeks partition of an estate. He is the owner of the undivided one-half of the estate and the defendants, Otto G. Briggs and Luther A. Briggs, of the other half, all subject to the life estate of the defendant, Charlotte Briggs. A demurrer is interposed to the petition upon the ground that partition does not lie where there is an outstanding life estate in the whole tract. This contention must be sustained. Partition operates upon the possession. The object of the proceeding is to secure to the tenant the exclusive possession of his share of the joint property and where the petition does not state facts upon which the court can take jurisdiction of the possession, no such possession can follow the judgment. *Tabler v. Diseman*, 2 Ohio St., 207.

An answer and cross-petition is filed by the owner of the life estate consenting to the partition and the sale and prays that she may be paid the value of her life estate out of the proceeds. This, of course, the demurrer does not reach. The demurrer is to the petition only. But I am asked whether partition would lie in case these facts were set up in the petition also. I am inclined to think not. It is held that where the remainder-man is also the owner of a life estate, that par-

tition may be had at his instance, "but," the court say "(unless by consent of the other owners of the remainder) there ought not be a partition of the residue among them, for the reason that, if it should be done, they could acquire thereby no present right to the possession of their shares so set off." *Elrod v. Bass*, 1 C. C., 38; *Toledo Loan Co. v. Larkin*, 1 C.C.(N.S.), 473; *Morgan v. Staley*, 11 Ohio, 389.

That is to say, such tenant in common is entitled to have his share set off to him, but that partition can not be forced upon the other remainder-men. It would certainly follow from this that if the plaintiff does not own the life estate either on the whole tract or some part of it, that partition can not be had without the mutual consent of all. To entitle him to partition, the court must first find that the plaintiff has a legal right to some part of the estate, and upon this finding commissioners are appointed to make it. General Code, 12029.

Partition means division—not sale. The writ is directed to the sheriff with the command that, by the oaths of the commissioners, he cause to be "set off and divided" to the plaintiff, or each party in interest, such part and proportion of the estate as the court orders. General Code, 12030.

There is no provision by which the court may determine the part or proportion of the estate which may be set off and divided to the owner of the life estate. Of course, the life estate could be appraised separate from the whole estate and paid for out of the sale, if the sale is had, but there is no right to force a sale where there is no right of partition. The right to a sale depends upon the right of the plaintiff to partition, as a condition precedent, and a sale follows only when the commissioners find that the estate can not be divided without manifest injury to its value and there is no election to take at their appraisalment. General Code, 12034-12036.

If there was a provision whereby the tenant in common could enforce the sale of the estate not dependent upon the right to partition, I would be inclined to hold that the petition with the proposed amendment would be good, but there is no such provision, as already explained, and holding the views which I have expressed, the demurrer must be sustained.

Judgment accordingly.

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Fleming v. McGuffey et al.

**DETERMINATION OF RIGHTS OF JUDGMENT CREDITORS
IN LANDS OF A DECEDENT.**

Common Pleas Court of Franklin County.

MARGARET FLEMING V. JOHN G. MCGUFFEY ET AL.

Decided, November 29, 1910.

Decedent's Estates—Probate Court Without Equity Jurisdiction to Determine Equities and Set Aside Deeds—Procedure for Ascertaining Rights of Judgment Creditors in Lands of a Decedent.

In a proceeding by an administrator to sell real estate to pay debts, there is no general equity power in the probate court which will permit of a determination of the rights of judgment creditors of the estate in land claimed by the widow by virtue of a lost deed which she caused to be restored after her husband's death; but the proper forum for judgment creditors thus situated is in the common pleas court, where they may file an action in the nature of a creditor's bill asking to have the deed in question set aside and the land sold to satisfy their judgments.

Daugherty & Todd, M. E. Thraülkill and W. T. S. O'Harra, for plaintiff.

John J. Stoddard, W. R. Williams and F. C. Rector, for defendants.

DeWitt & Hubbard, for Mrs. Haviland.

Florizel Smith, for Dr. Clare Smith.

KINKEAD, J.

A demurrer to the petition of the plaintiff and to the cross-petitions of defendants by Mary E. Haviland is submitted.

The action of plaintiff and of the cross-petitioners is in the nature of a creditor's bill upon judgments obtained by them against the bondsmen of an executor. Mary E. Haviland is the widow of Michael Haviland, deceased, who was one of the bondsmen on the executor's bond.

The rights of the respective parties were determined upon a general demurrer to the petitions and cross-petitions nearly two years ago, a report of which decision, with the facts stated in

full, is found in *Fleming v. McGuffey* 8 N.P.(N.S.), 430. The present demurrer is submitted upon two grounds:

First, that the court has no jurisdiction of the subject-matter of the action; second, that the plaintiff has no legal capacity to sue, and the cross-petitioners have no legal capacity to sue.

It is argued that plaintiff and cross-petitioners being mere creditors of the deceased, Michael Haviland, can not collect their judgment debts in an action of this character against the administrator of the decedent's estate by enforcing a sale of his real estate as sought in the petition; that it is the exclusive function of the administrator to sell the land and pay the debts of the estate.

The plaintiff in this case obtained judgment against Michael Haviland's estate November 11, 1904. The cross-petitioner, the Tribune Fresh Air Society, obtained its judgment June 17, 1905. Immediately upon the conclusion of the original case to test the liability of the Haviland estate upon the executor's bond, which was April 22, 1902, Mary E. Haviland commenced her action in this court which was concluded June 18, 1904, in which the destroyed deed was restored, which placed the title to the premises in controversy in her.

As stated, this court upon general demurrer has found the equities in favor of the petitioner and cross-petitioner and against Mary E. Haviland, and all that remains to be done is to try the case upon the facts. If the petitioners establish their contention upon trial, a court of equity will be called upon to decree that the property in question belongs to the estate of Michael E. Haviland, and not to his widow, and that it is, therefore, subject to sale for the payment of his debts. These facts make it readily apparent that the interposition of a court of equity is first necessary before any sale of the property can be had.

The facts in this case remove it from the operation of the rule applied in *Sidener v. Hawes*, 37 Ohio-St., 532. In the latter case there was no controversy concerning the ownership of the lands by the decedent, but it was conceded to be in him. An heir, to whom it descended, has conveyed it away without there

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having been an administration of the estate, the debts of which had not been paid. The sale by the heir could not divest the land from the lien of the debts. While the court in this case did settle and adjust equities which the purchaser had, this relief was incidental and not paramount.

In the case in hand the paramount relief demanded concerns the rights of the estate of Haviland and his widow. She claims the property under a deed, which her husband destroyed during his lifetime, he promising her that he would give her his property by will, and did give her the same property by his will. The deed was given to the wife in the first instance for a stale loan. She accepted the terms of the will, took possession of the property, and deeded some of it away. She did not see the necessity of having the destroyed deed restored until the liability of the estate to these creditors on the bond was fixed. She immediately resigned as administratrix of her husband's estate, brought suit to restore the deed against the administrator, but did not make these judgment creditors parties thereto, although their actions were pending.

These matters have been determined upon general demurrer, and the facts need not here be further set forth. Sufficient has been stated to show that only a court of equity upon suit of the judgment creditors has power to determine the equities primarily between them and Mary E. Haviland concerning the land in question.

The former decision in fact has settled the nature and character of this suit. Whether right or wrong, this court has with scrupulous care made a finding of the relative rights of these parties and established the law applicable thereto. *Fleming v. McGuffey*, 8 N.P. (N.S.), 430.

It seems idle to now contend, in view of the very great difficulty in arriving at a conclusion concerning the equities, that this action should be dismissed, and that the administrator should commence the ordinary legal proceeding to sell the real estate. The probate court has no general equity power which would enable it first to determine the equitable questions involved which is a necessary pre-requisite to a sale of the real estate. This

court could not entertain an ordinary proceeding to sell real estate without first determining upon an independent cause of action the equitable question involved.

I have made diligent search among the authorities, old and new, to ascertain whether an executor or administrator has the right to bring a suit in equity to cancel or set aside conveyances made by his decedent for any reason other than fraud on his part to defeat his creditors. It must be remembered that proceedings to sell real estate are of statutory origin. The common law did not subject the lands of a decedent to the payment of his debts. And when the statute prescribed this remedy, it designated the administrator as the person to bring the action. It seems reasonable that the powers of an administrator are no broader than the powers conferred upon the courts by this statutory proceeding. Under the old system when the administrative features of an estate were within the jurisdiction of ecclesiastical courts, the chancery courts furnished a remedy for discovery of assets which were concealed by heirs or embezzled by the administrator. This remedy is now provided by statute but does not and may not be applied to realty.

I find in Wisconsin where the rule prevails that courts of original equity jurisdiction have general equity jurisdiction with county courts (probate courts) over matters pertaining to settlement of estates, *Burnham v. Norton*, 100 Wis., 8, the courts recognize the right of an administrator to institute an independent suit in equity to accumulate and secure the custody of the assets of the estate so that they may be distributed among those right fully entitled to them. And this, too, independently of the statute respecting embezzlement or concealment of assets. But the remedy was not pursued respecting title to real estate. *Eisenbraut v. Cornelius*, 134 Wis., 532.

Shotwell v. Struble, 21 N. J. Eq., 31, is an illustration of a suit in equity by an administrator for discovery and injunction concerning personalty. *Kirby v. Railway*, 14 Fed. Rep., 261, is an instance where an executor of a deceased member of a partnership maintained a suit in equity to discover the amount due to such partnership, and to recover such amount.

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I do not believe there ever was, or is now, among modern decisions, any precedent or authority to warrant an administrator to bring a suit in equity to contest the title or right to property in a case similar to the facts presented here. The personal estate was always regarded in equity as the natural primary fund for the payment of debts and legacies. It was but natural, therefore, for the courts in those states exercising concurrent jurisdiction in regard to the settlement of estates, to still recognize suits in equity concerning personalty by administrators. When the common law was in force, and the deceased's debts were not a charge upon his lands, in the anxiety of courts of equity to secure justice to creditors, very slight words in wills were construed as creating a charge on lands (Woerner, Administration, Section 490). So in this state, though the chancery jurisdiction in this court is merely auxiliary, the anxiety of the court in the exercise of such equitable jurisdiction as remains in it, should be directed toward the recognition of a suit on behalf of judgment creditors under circumstances as shown here, to subject the real estate standing in the name of the decedent for a long time prior to and at the time of his death, and claimed by his widow under these circumstances, where there is the least doubt as to the efficiency of the ordinary remedy at law for the sale of real estate by an administrator. But I feel satisfied from careful examination of this subject now and at other times, that an administrator may not bring a creditor's bill to determine equities as they are presented by the facts in this case. It has been held in those states where equity jurisdiction is concurrent in courts of original jurisdiction with those exercising probate jurisdiction, that a creditor may institute an action to subject the lands of a decedent to sale, where the administrator has delayed in so doing for an unreasonable length of time.

And when there has been no administration, and the heirs have divided the property among themselves, the right of a creditor to bring the action is recognized (*Cameron v. Cameron*, 82 Ala., 392). So in this state, where the equity jurisdiction is auxiliary, this court should entertain jurisdiction in a case like this where the widow who claims ownership of the property as

against the estate, has acted as administrator throughout the litigation and until defeat in the Supreme Court, and who did not change her attitude from a devisee to that of an owner by virtue of an alleged destroyed deed, until the liability was fixed against the state. The recognition of jurisdiction in equity in the case of *Taylor v. Huber*, 13 Ohio St., 288, without the delay and expense of successive administrations, is not stronger justification than the circumstances of this case show for retaining jurisdiction.

The contest, as I view it now, is one primarily between the judgment creditors and Mary E. Haviland, widow. This action is in the nature of a creditor's bill to reach assets which justly and equitably, so far as the pleadings disclose, belong to Michael Haviland's estate. The purpose of the action was to bring this property within the power and control, of the administrator of his estate, so that it might be administered and distributed by him. Special objection is made because the petitioners ask sale of the real estate involved. It will be noticed that the prayer of the petition, relating to the Haviland property, is as follows:

"That all of the property owned by Michael Haviland at the time of his decease may be sold to pay his debts, and all deeds therefor may be set aside and declared null and void as to his creditors, and that all persons now owning or holding any of his said land may be compelled to account for the proceeds of such land and for the rents, issues and profits thereof."

It is shown in the petition that Mary E. Haviland has made a number of deeds in her own name, and the petition seeks to have these lands all made subject to the payment of the debts of the estate. The rule is that the court will afford whatever relief the facts pleaded warrant, the several prayers if inconsistent therewith being disregarded if necessary. The fact that, among other reliefs prayed for, the complainants here ask for a sale of the real estate is not material. The principal relief prayed for concerns title and equities between the parties. This court may proceed to hear and determine the rights of the parties under the pleadings in this case, and if it be finally found that the property in controversy belonged to Michael Haviland, it may

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direct that the same be turned over to the administrator to be administered by him according to law. The relative powers and functions of the probate and common pleas courts in respect to the settlement of estates of deceased persons are clear and distinct. There is no difficulty whatever in reaching a conclusion in the questions raised by this demurrer.

The power of probate courts in Ohio over the administration of estates is so broad, minute and peremptory that the general jurisdiction originally belonging to courts of chancery over the settlement of decedent's estates is completely taken away from this court and wholly transferred to the exclusive cognizance of the probate courts. Many of the so-called contentious matters formerly within the exclusive jurisdiction of equity have been committed to the jurisdiction of courts of probate. This court, however, still has jurisdiction in equity over the subject-matter of a decedent's estate for any special purpose not within the competency of the probate court. This jurisdiction in equity is entirely auxiliary and can be exercised only when the remedies conferred upon the probate court are imperfect or inadequate, and with reference to matters which lie outside of the regular course of administration and settlement which are purely of equitable cognizance and which do not come within the scope of the probate jurisdiction. See 1 Pomeroy, Eq. Jurisp., Sections 235, 1154; *Piatt v. Longworth*, 27 Ohio St., 159, 186; *Taylor v. Huber*, 13 Ohio St., 288; *McDonald v. Aten*, 1 Ohio St., 293.

The practice was not so clearly drawn when this court exercised jurisdiction in probate matters. *Cram v. Green*, 6 Ohio, 429; *Stiver v. Stiver*, 8 Ohio, 217; but, as stated in *Piatt v. Longworth*, *supra*, page 186:

"Since the probate act of 1853, that court has exclusive jurisdiction of the settlement of accounts of executors and administrators. When that remedy proves inadequate the aid of a court of equity may be invoked."

In *Taylor v. Huber*, *supra*, a trust was enforced in equity without the delay and expense of successive administrations. The equitable principle expressed in a *dictum* in *McDonald v.*

Aten, supra, page 297, has material bearing on the case. The judge delivering the opinion there stated that cases may arise:

“When, from the peculiar relations of the administrator to the estate, or his connection with a title sought to be converted into assets, in the opinion of a majority of the court, the aid of a court of equity may be invoked by a creditor, not for a general settlement of the estate of which he is a creditor, but for the purpose of reaching and placing in the hands of the administrator assets which might otherwise not be reached. But, this object accomplished, the court of equity will have performed its function, and leave the distribution of the assets thus obtained, to the probate court.”

Pomeroy, Eq. Jurisp., Section 1154, p. 2297, states:

“By virtue of the auxiliary jurisdiction of equity, a creditor may maintain a suit somewhat in the nature of a creditor’s bill, to reach assets which justly and equitably belong to the estate and to bring them within the power and control of the administrator, so that they may be administered upon and distributed by him.”

This appears to be precisely what the petitioners are seeking to have done in this case. Or, in other words, if the lands are finally subjected to the demands of the creditors in this case, if found necessary, the court may either order the property sold and the proceeds turned over to the administrator for distribution, or it may direct that the same be turned over to the administrator to be sold. The court may exercise its discretion by ordering the property to be sold in this proceeding to save the expense of a new action by an administrator. It is claimed here that good title can not be passed to the purchaser upon a sale ordered in this proceeding. This contention is not well founded in view of the authorities cited in this opinion. It is also claimed that the petitioning creditors are seeking to have the proceeds of the property paid over direct to them. This claim is not well founded because if the land should be sold in this proceeding, the proceeds thereof will be directed to be paid over to the administrator to be distributed by him according to law.

The logical result of the contention of counsel would be that

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the creditors not having the right to prosecute this action, they must resort to the remedy of proceedings to sell real estate by an administrator to pay debts. This question may become pertinent in the event that the petitioners are successful in the trial of the merits of the action. The question of what this court would finally do, touching the sale of this property in the event of a decree in favor of the creditors, has an important bearing upon the questions raised by the demurrer. In assuming jurisdiction in equity over this case, the court may observe the rule of equitable procedure by continuing to exercise its jurisdiction to the end that full and complete justice may be done without regard to the remedy prescribed by law for the sale of real estate by an administrator for the payment of debts. Having properly acquired jurisdiction over the Haviland lands, this court would hesitate to turn the sale of lands over to an administrator after the lapse of so many years since the death of Michael Haviland. in view of the holdings by intermediate courts in the state touching the time within which proceedings by an administrator to sell lands may be brought. The Superior Court of Cincinnati, Saylor, J., has held that the six year limitation governs such actions. I can not now give the case or report, but it was an action to sell lands for the payment of a legacy. The Circuit Court of Coshocton County, *Ling v. Strome*, 12 C.C.(N.S.). 161, in an action to quiet title as against the claim of an administrator of the right to sell the decedent's lands immediately upon the death of the widow, has held that the six year limitation applies to the right of an administrator to sell lands on the ground that the liability to have lands taken from those to whom it descends and applied to the payment of the debts, is one created by a statute and is governed by the six year limitation. Revised Statutes, 4981 (General Code, 11222).

While I am of the opinion that there is no positive statute of limitation applicable to such proceedings, and though the Supreme Court in *Lafferty v. Shinn*, 38 Ohio St., 46, and in *Taylor v. Thorn*, 29 Ohio St., 569, sustained proceedings by an administrator to sell real estate many years more than six years after the death of the decedent, this court would be justified in

refusing to subject the creditors in this case to the hazard of such claims by turning the sale of the real estate over to an administrator after a decree that the lands in question belong to Michael Haviland's estate. It would for this reason and other reasons be justified in continuing to exercise its equitable jurisdiction to the end that the lands should be ordered to be sold so as to apply the proceeds thereof to the payment of the claims. This course should be pursued because the claims asserted have been prosecuted in due time and equity should continue to exercise its jurisdiction until the proceeds of the real estate are placed in the hands of the administrator to be distributed according to law, if that should be the final decree in the case.

It is the order of the court that the demurrer to the petition and cross-petitions be overruled.

DEMURRER TO ANSWER.

A demurrer to the second defense in the answer of Clare Smith is also admitted for decision in this case. The defense alleges that the administrator of the estate of Michael Haviland, deceased, is the party prescribed by law to bring and maintain an action for the sale of the real estate of the deceased to pay the debts. The demurrer presents the same question as was raised by that of Mary E. Haviland to the petition and cross-petition. It assumes a different phase, however, under the facts relating to the Smith property.

The demurrer to the petition and cross-petition was overruled upon the theory that by reason of the claims and equities in controversy between the judgment creditors and Mary E. Haviland, this proceeding in equity was necessary, and that the ordinary proceeding by an administrator to sell was inadequate. But I find in passing upon this demurrer and stating the reasons for the action taken upon it, that they are as applicable to the decision on the demurrer of Mary E. Haviland and strengthen and fortify that conclusion.

The facts presented by this demurrer are simply that Mary E. Haviland took the Smith property as sole devisee and in that capacity she conveyed it to Lucien Livingston, September 10,

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1898, who in turn conveyed it to Clare Smith, October 17, 1933.

It is urged by counsel for Smith that the rule in *Sidener v. Hawes*, 37 Ohio St., 532, should apply to the property involved in this demurrer.

It seems to me that impartial reflection upon this proposition, considering the facts, will at once disclose that the circumstances in so far as they reflect upon the character of relief sought and which must be granted before an order of sale is made, will show that the equitable remedy now being pursued by the judgment creditors is the only adequate one. The question in *Sidener v. Hawes*, *supra*, was a simple matter of sale of the real estate, which had been conveyed away by an heir of the decedent, by the administrator to pay debts. There was no primary and paramount equitable relief necessary in that case before a sale was ordered. Some incidental relief subsequent to the sale was necessary in order to protect the equities of the innocent purchaser. We need, however, only to carefully read the petition and cross-petition in this case to readily perceive that this proceeding is the only adequate method of adjusting the complicated equitable questions concerning all the property involved in the case, including the Smith property as well as the facts relating to the remaining portions of it. The judgment liability asserted in this case is a joint and several judgment rendered against John G. McGuffey, Frank F. Hoffman, Zeno C. Payne, Mary Walton and Michael Haviland, or against the estates of the deceased persons. It is averred that execution was issued upon the judgments and returned *nulla bona*. This is usually regarded as a condition precedent to bringing a creditor's bill, that some of the defendants to the judgment are insolvent.

It is urged in argument that the judgment upon the claim of the petitioner and cross-petitioner must be treated in the same light as any adjudication in an action on a claim which has been rejected. That is, the debt that may be proved in the action, "shall be paid only out of such assets as remain in or come to the hands of the executor or administrator after paying the sums due on prior order of distribution." General

Code, 10892, 10903. General Code, 10737, forbidding issuance of execution upon a judgment against an administrator, is also cited.

The inferential argument made from these provisions is that it tends to show that the ordinary way of satisfying the judgments is by petition to sell real estate by the administrator.

The design of the statute is that the orderly course of administration shall not be affected by an execution. The court rendering judgment is given power by the statute to so regulate the execution as to reach the just proportion of the assets applicable to the judgment.

This argument, in my judgment, only tends to strengthen the position that this action is the only adequate remedy to be pursued in this case. The petition does not show that any execution was issued and levied upon any real property. It could not have been because of the condition of the property.

A circuit court decision is cited by the demurrants, *Hoffman v. Kiefer*, 19 C. C., 401. This case decides that the remedy provided by General Code 6139 by an administrator to set aside a decedent's fraudulent conveyance is not exclusive, but that a court of equity has jurisdiction to entertain such an action by a creditor.

How much more reason there is, therefore, for continuing this case, and overruling the demurrer because of the complications in the property involved and in the several liability of the parties, and all the debts of the Haviland estate being p excepting these claims.

It is not made clear by the petition what portion of the property of any one of the defendants must be sold in order to satisfy the claims, nor can a court determine how much of the property of the Haviland estate, whether all or a portion of it, shall be sold, until the facts are fully developed upon a trial of the case. Some of the conveyances are charged as being fraudulent transfers on the part of the grantors to evade these judgment claims while others are not so attacked. Some of the grantors are dead, and others are the legal representatives. The charge of fraud against McGuffey, who is deceased, is a liability

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connected with persons living and dead and administrator's suit for the Haviland lands could not be made the vehicle to adjust the liabilities. It is averred finally that neither the said John G. McGuffey, Zeno C. Payne, Frank F. Hoffman, Mary Walton or Michael Haviland's estate has sufficient property to pay the judgments except for the property which he described and set forth in the petition, and that the judgment is joint and several against all of them, and that such transfers and liens cast clouds upon the said property. It seems apparent, therefore, that by reason of the complications respecting the real estate involved, that it will be difficult to determine what proportion of the lands of any of the defendants should be sold. I do not see how the questions involved in this case could possibly be determined by any other proceeding than a creditor's bill. It would be impossible for the liabilities of the several bondsmen and their estates, by reason of the joint and several judgments, so far as respects the real estate bound thereby, to be settled in a proceeding brought by an administrator of the Haviland estate. It would be a strange proposition to have an administrator of the estate of one of the deceased judgment debtors sell the property belonging to that estate voluntarily for the purpose of paying off judgment claims which are liens upon property belonging to several other joint debtors. It seems to me that putting the question as it has just now been stated is a complete refutation of the claim that any remedy other than a creditor's bill is adequate. An administrator of the Haviland estate could not in a proceeding be made to sell the property for the proportion which his estate should pay on the judgment determined in that kind of an action without having the estates of the other individual bondsmen made parties defendant in the case. Such a proceeding would be unusual and this view of it demonstrates the utter fallacy of the claim made upon the demurrer.

In passing upon the Haviland demurrer my mind was absorbed with the equitable questions which surround her claims by reason of the suit restoring the destroyed deed. The grounds stated in this opinion did not occur to me at that time, but they

apply equally to that decision. I find in going over the petition again, that it is directly charged that the suit of Mary E. Haviland to restore the deed was for the purpose of hindering, delaying and defrauding creditors and to cover up the property and that it was based upon an unfounded fraudulent and illegal claim devised and concocted to defraud the creditors of Michael Haviland. This was not an act charged against a decedent. If there is anything in this charge, it is evident that such a claim could not have been made by an administrator to sell the particular part of the real estate covered by this deed. The restoration of the deed by this judicial decree presents an altogether different situation from an ordinary conveyance of property by an heir.

One further matter may be mentioned. The petition alleges that all of the preferred claims and the debts of the Haviland estate have been paid. If this proves to be the fact and that these judgments are the only remaining debts, the case is then brought clearly within the rule expressed in *Taylor v. Huber*, 13 Ohio St., 288. The widow of Michael Haviland had been in possession of the estate for some time and had made numerous conveyances. This shows that the debts must all have been paid or she could not have thus dealt with the property as her own. The claim that an administrator should now bring the action to sell real estate in view of all these facts does not come with much force. Applying the rule of the Supreme Court expressed in the last cited case, there being nobody to be paid from the property of the estate except those judgment creditors, equity may decree a sale of the property and payment directly to the judgment creditors without the delay and expense of another administration.

The demurrer to the second defense of the answer of Clare Smith is sustained.

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Gebhardt v. Ibele.

CONTRADICTORY PROVISIONS IN BUILDING CONTRACT.

Common Pleas Court of Cuyahoga County.

E. W. GEBHARDT v. HERMAN IBELE.

Decided, October 7, 1911.

Reformation of Written Obligations—Decree of, Will be Granted, When—Evidence Permitting Reform of a Building Contract—Extraneous Facts—Mistake—Relief in Equity.

1. The rule that a written obligation can be reformed only on clear and convincing evidence is satisfied in the case of a building contract, containing a provision which seems to exclude allowances to the owner enumerated in the specifications, where the weight of the testimony is to the effect that this provision was inserted for the very purpose of eliminating these allowances.
2. In determining such a case it is competent for the court to consider the price for the work specified in the contract, and where the price would not permit of the allowances claimed by the owner without causing the contractor to do the work at a loss, that fact must be regarded as confirmatory of the contention of the contractor that he insisted on the allowances being eliminated and the provision in question was inserted for that purpose.

W. H. Boyd, for plaintiff.

George O. Willett, contra.

NEFF, J.

The case of E. W. Gebhardt v. Herman Ibele is an action brought by the plaintiff to recover a balance of \$1,022.50 claimed to be due to the plaintiff on a certain contract for the doing of the carpenter work for the erection of a terrace for the defendant. The action also seeks foreclosure of a mechanic's lien, and the proceeds of the foreclosure to be applied to the payment of the balance claimed to be due.

In addition to this, it is sought by the plaintiff to have the court reform the contract, so as to eliminate from the plaintiff's contract certain matters contained in the specifications, which are referred to as allowances to the owner.

The contract between the parties is in writing, and provides that, in consideration of the payment of \$4,070, the plaintiff

shall do and perform certain work and furnish materials according to plans and specifications theretofore drawn. The specifications, under the title of "Trimmings: (Hardware)" contain this provision:

"The carpenter contractor to allow the owner the following allowance for the selection of the items mentioned:

"No. 1. Allow \$200 for mantels.

"No. 2. Allow \$190 for gas and electric fixtures.

"No. 3. Allow \$110 for finish hardware.

"No. 4. Allow \$475 for furnaces.

"No. 5. Allow \$190 for decorating."

The clause of the contract as to which reformation is sought is as follows:

"The carpenter's contract to include all lumber and finish, also labor and rough hardware, and doors, windows, weights and pulleys. The owner to furnish finish hardware and the carpenter to put same on.

"The outside walls are not to be furred as specified.

"Sidewalks and gravel or slate roofing is not included in this contract."

The amended petition has been mislaid; at all events I am not able to find it among the files; but as near as I am able to remember the exact language, it is to this effect, in respect to the reformation of the contract, that the contract be so reformed as to eliminate from the obligation of the contractor any obligation to do and perform the several matters referred to in the specifications as allowances; the practical difference being this: the plaintiff contends that he is to be entitled, having performed his contract, to the full amount named in the contract, to-wit, \$4,070; the owner's contention being, that from that should be allowed approximately \$1,050, and that therefore there is nothing due to the plaintiff, he having been paid in full. If the allowances are not included in the contract, and if the owner is not entitled to these allowances, then there would be a balance of somewhat more than a thousand dollars.

As I understand the defendant, there is no substantial contention but that the mechanic's lien conforms, in its execution, time of its execution, and filing, to the statute. There is no infirmity,

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perhaps, in that that would invalidate it. As I understand, there is practically no contention between the parties along this line; and if there is, the understanding was that the issue of reformation should be tried out first, and then if there were further matters to be determined, they should be reserved for future consideration.

The doctrine in equity is, that where there is a mutual mistake of fact between the parties to a written obligation, and if, because of such mutual mistake, the contract fails to express the exact intention of the parties, a court of equity may reform the contract so as to make it express the intention of the parties to the contract.

The contention of the plaintiff, briefly stated, in this respect, is this: that it was the intent and purpose of the scrivener of the contract, when he wrote it, and the purpose of the parties when they executed it, that it should exclude from its operation matters referred to in the specifications as allowances. On the other hand, the contention of the defendant is, that it was expressly understood that these allowances were to be made to the owner, and that the contract of plaintiff did include allowances, and that there is no balance due.

Briefly stated, this may be said to be the contention of the parties.

The first subject-matter of interest is, whether this is such a mistake as would be competent for a court of equity to reform or correct by reformation of the contract.

I think that the case cited in the 11 Ohio, on page 480, the case of *Lewis Evans v. the Administrator and Heirs at Law of James Strode*, is exactly in point in the decision of this question. The syllabus is as follows (I shall read only that, which is perfectly clear):

"Where an instrument, by a mistake of the parties as to the legal effect of the terms used, fails to carry out their intention, relief may be afforded in equity.

"A mistake in law may be corrected in equity."

So that I think the subject-matter is such that, if the facts would warrant such a course, the court might properly reform the instrument.

The next subject, so far as the law in the case is concerned, that is of interest, is as to the weight of the evidence as to the necessary *quantum* of proof to warrant the court in thus reforming the contract, and upon this subject the Supreme Court, in 27 O. S., page 84, in the case of *David H. Potter v. Ellen S. Potter, Executrix of Cassander E. Potter, Deceased*, has stated the law, the syllabus reading as follows:

“Clear and convincing proof is required to warrant the reformation of a written instrument on the ground of mistake; and when it clearly appears that this rule has been disregarded in reforming the instrument, and the finding of the court can be sustained only on the supposition that it regarded the law as requiring nothing more than a mere preponderance of evidence to warrant a finding sustaining the alleged mistake, a reviewing court, on error, may reverse the judgment based on such finding.”

In the opinion, on page 85, Day, J., says:

“When the reformation of a written instrument is sought on the ground of mistake, the presumption is so strongly in favor of the instrument, that the alleged mistake must be clearly made out by proofs entirely satisfactory, and nothing short of a clear and convincing state of facts, showing the mistake, will warrant the court to interfere with and reform the instrument. This principle rests upon the soundest reason and upon undisputed authority, and if not adhered to by the courts, or, when plainly disregarded, is not enforced by reviewing courts, the security and safety reposed in deliberately written instruments will be frittered away, and they will be left to all the uncertainty incident to the imperfect and slippery memory of witnesses.”

This is no doubt the law in Ohio, and evidently in other jurisdictions. This is a doctrine that arises out of the very necessities of the case. Where parties have gone through the solemnity of recording their agreement, putting it into writing, it would be unwise, exceedingly unwise, for courts of equity to interfere and declare them as otherwise than what they have expressly stated, unless the proof is clear enough to be convincing and satisfactory. But if it is satisfactory, and convincingly shows that the language employed by the parties to the written agreement does not express the intent of the parties making the contract, a court of equity may be warranted in intervening by reformation; and

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this results from the very nature of the case, because, at most, while a good deal of solemnity attaches to the fact that the parties put their sign manuals to a certain paper, while we think a good deal of importance attaches to that act, yet, after all, in the last analysis, the writing itself is only the written evidence of the intention of the parties.

A contract means the meeting of the minds, the coming together of the minds, a proposition on one side and an acceptance by the opposite side in the precise terms in which it was made by the other; and it is this agreement of the minds, the coming together of the minds of the parties, that fixes the rights of the parties; and the written instrument is at most and at best merely evidence, although the best evidence, of what the contract was.

But whatever the reasons inducing courts of equity to intervene in such matters are, the law is fully settled in Ohio; so that it only remains for the court to determine as to the question of evidence, whether or not it is established by full, clear, convincing and satisfactory evidence that the language of the contract does not express the intention of the parties to the instrument.

This contract was written out by one of the architects. The parties met one evening, and at the very first blush of this situation we are confronted by a serious disagreement as to what the facts were.

The plaintiff, and Warner and Bolmeyer, the two architects, say that the specifications were not there. The evidence shows that some time prior to that a copy of the specifications had been put into the hands of the plaintiff, and that he had examined them; that some conversation was had with him and by him about the specifications; but the defendant says that the specifications were lying upon a little table right near.

Now, the plaintiff and the two architects say that, while the contract was under consideration, the question of allowances as provided for by the specifications came up, and a talk was had about it, and that, as a result of that talk, the language which I have already read, the first clause if not more, was inserted into the contract, and that it was expressly understood and assented

to by all the parties that the language was sufficient to exclude from the contract the allowances referred to in the specifications.

The contract is very inartistically drawn, containing very little detail, so little in fact that at first blush a person reading it would infer that Gebhardt was to build the entire terrace and furnish all materials and all the labor. And the language inserted in the contract is peculiar, as follows: "The carpenter contract to include all lumber and finish, also labor and rough hardware and doors, windows, weights and pulleys. The owner to furnish finish hardware and the carpenter to put same on." Observe there is no reference made to allowances here. They say it was included. There is a suggestion in the very language itself that the matter was under consideration as to what this contract did include. The two architects and plaintiff say that the specific purpose of inserting this language was to make it definite and certain as to what was included, and to exclude the matter of allowances, and the other party denies it. And so the issue is made. As a matter of fact, what was the intention of the parties? Was it the intention of the parties, in inserting said language, to exclude the allowances as set out in the specifications, or not?

There are three witnesses, two of whom are apparently disinterested, and one of them is remotely related to the plaintiff, and that relationship might possibly suggest some infirmity in his testimony.

If the case depended upon a preponderance of the evidence, I should have no hesitation at all in saying that it is apparent from the proof that it was the intention of the parties that the allowances were not to be included in plaintiff's contract. But the question presented is this: Is the evidence clear, convincing and satisfactory?

There are other facts or items of evidence, however, to which appeal may be made in determining this question, and I will call attention to some such matters. They are relevant, even though they do not bear directly upon the question in issue to be definitely determined.

William Rugh testified that at a certain time of payment there would be \$400 due that day, which made an aggregate of \$1,900

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to apply on the contract. At the time that payment was made the defendant said that the work was about half done. Now, \$1,900 would be a little less than half of \$4,000. The inference from this statement would be that, according to defendant's conception of the situation, he regarded the allowances as not included in the contract, and the total amount to be received on it would be \$4,000 instead of \$3,000, because such a statement would not naturally be in accord with the situation where the plaintiff was to receive only \$3,000. This evidence is of value, and besides it is contradictory to Mr. Ibele's testimony. Mr. Ibele denies having said that. That evidence, therefore, has both a positive and a negative value—positive as tending to establish plaintiff's contention, and negative as tending to weaken the credibility of Mr. Ibele.

George F. Schaefer says he was present at the time both the parties assented to excluding the allowances.

Rose Gebhardt, wife of the plaintiff, says that she was present when defendant stated that the allowances were not to be included. It was suggested by counsel for defendant that the very emphasis with which the wife of plaintiff insisted that this remark was repeated, with a very tiresome reiteration, tends to weaken her testimony. I think there is something in that suggestion; it is indicative, at least, of quite a great deal of zeal on her part.

Mary Ibele, wife of defendant, testifies that the situation was such as would make it very improbable that Mrs. Gebhardt could have heard such a conversation, and tends to discredit her statement.

There is another circumstance to which I think appeal may be had in determining this issue of fact—counsel for defendant does not quite agree with the court, and I don't know but that counsel for plaintiff was disposed at one time to dissent from the opinion of the court, and that was this: Here it is contended by one party that the work, labor and materials on this contract were to be rendered, performed and furnished for \$3,000; the other side said "No, for \$4,000." Now, it seems to me—and I started the inquiry as to what was the actual cost of these materials and the actual cost of that labor at that time, the labor

provided for and the materials provided for in the contract, the actual cost put in the apartment on the basis of the market values at that time; and so I started the inquiry by asking the plaintiff whether he had any account of the actual cost to him of labor and materials furnished and used in the completion of this work. He then produced a book in which entries were made showing, or tending to show, that the work actually cost him, in labor and materials, \$3,725. After the court had thus initiated this inquiry, both sides called in witnesses. After a good deal of reflection on this subject, I am still inclined to think that the court may appeal to such an extraneous fact as that in a case of doubt.

George Colemeyer, an architect, swears that the work would cost at that time at least \$3,700 for labor and materials.

James Cameron, who was called by the plaintiff, swears it would cost \$3,150 without profit to contractor, but if profit were added, it would be \$3,430.

Charles Tousley, also called by the plaintiff, swears he had figured upon a single suite, and upon his estimate of the cost of one suite, he figured that \$3,772 would be his estimate.

Henry G. Slatmyer estimates the cost of the work at that time, upon the basis of everything being first class, at \$4,642.

H. A. Hansen figured it at \$4,071.

After adding all these different estimates of carpenters, we find that they average \$3,934.

It seems to me that that fact might lend aid to the court in deciding what the fact was, whether this man was contracting to do this job for \$3,000 or \$4,000. The fact that the work could not possibly be done for the \$3,000 might be a circumstance bearing upon the question as to whether he really undertook to do the work for that sum of money.

Now, this is the situation before us, substantially. And so, after this somewhat hurried and meager review of the testimony, the question recurs—and it is a question that must be decided—is it established by clear, satisfactory and convincing proof that the intention of the parties to this contract was to exclude from its operation of the contract the allowances named in the specifications?

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I am inclined to think that the evidence is so clear, satisfactory and convincing that the court is called upon to reform the contract in that respect. Plaintiff may therefore take a decree.

RECOVERY OF ILLEGAL FEES DRAWN BY A PUBLIC OFFICER.

Common Pleas Court of Hamilton County.

THE STATE OF OHIO, EX REL H. M. RULISON, v. WALTER B. WEAVER.*

Decided, 1909.

Office and Officer—Fees and Mileage Paid Illegally—Action by Prosecuting Attorney for Recovery of—Compensation—Voluntary Payment—Sections 2866 and 2921.

1. Fees and mileage illegally paid to a coroner may be recovered in an action brought by the prosecuting attorney under the provisions of Section 2921.
2. The fact that money so paid was in compromise of a claim made against himself by the county commissioners for a larger sum paid to him as salary under an unconstitutional law is not a bar to such an action.
3. The rule that money voluntarily paid can not be recovered does not apply to the case of one public officer dealing with another public officer with reference to their compensation as such officers.

Alfred Bettman, Assistant Prosecuting Attorney, for plaintiff.
Robert C. Pugh, contra.

GORMAN, J.

Opinion on demurrer to answer.

This is an action by the prosecuting attorney of Hamilton county to recover for the county, under the authority vested in him by Section 1277, Revised Statutes, \$1,743.65 from the defendant Weaver for fees and mileage alleged to have been illegally drawn from the county treasury by said Weaver while acting as coroner of the county, during his term from January 1, 1903, to January 1, 1905. The answer of the defendant admits

* Affirmed, *Weaver v. State*, 13 C.C.(N.S.), 40; judgment of Circuit Court affirmed by Supreme Court without opinion, 83 O. S., 508.

the drawing of the amount of money alleged and for the purposes alleged, but denies that the sums so drawn were illegally drawn, because he avers that he was entitled to all the fees and mileage charged and paid, and secondly he avers that he drew from the county treasury during said period as salary and expenses the sum of \$5,888 under a law which was declared unconstitutional about the close of his said term, and upon being requested by the county auditor and commissioners to repay said salary so drawn and his refusal, the whole matter was compromised and settled by the commissioners and himself by agreement with full knowledge on the part of the commissioners of all the facts and the law, and by said agreement he was allowed for fees and mileage as provided in Section 1239, Revised Statutes, \$5,870, being \$18 less than his salary and expenses drawn under said unconstitutional law, and that he paid into the county treasury upon said settlement with said commissioners said sum of \$18 to balance the account. And he pleads this settlement in bar of a recovery in this action. The demurrer to this answer is on the ground that the allegations thereof do not constitute a defense.

The demurrer is sustained on the authority of *Jones, Auditor, v. Comrs. of Lucas County*, 57 O. S., 189; *Higgins v. Comrs. of Logan County*, 62 O. S., 621; *Richardson v. State, ex rel*, 66 O. S., 108.

I have read with care and given full consideration to the very able and exhaustive briefs of Mr. Bettman, Assistant Prosecuting Attorney, and Mr. Robert Pugh for defendant, and having examined the authorities cited, have come to the conclusion that the answer of defendant does not present a defense to the action. The money drawn from the county treasury as salary by the defendant was under an unconstitutional law and the prosecutor might have brought suit to recover the entire amount thus paid because no act under that law was valid, or as was said by the Supreme Court in the case of *Findlay v. Pendleton*, 62 O. S., 80, on p. 88:

"It (the unconstitutional law) was void, not only from the time it was declared unconstitutional, but it never had any valid-

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ity and could not be invoked as a foundation of a right to be enforced in a court of justice."

Therefore there could have been no defense interposed to an action by the prosecuting attorney against the defendant to recover the entire salary drawn by him under said unconstitutional law. He might have counter-claimed for his fees and mileage in lieu of his salary, but in that event he could not have been allowed more than the amount of fees and mileage as fixed by the statute (Section 1239, Revised Statutes). This amount would be \$1,743.65 less than the amount he had drawn out as salary and expenses, and therefore on consideration of the petition and the counter-claim the plaintiff would have been entitled to a judgment against the defendant in the sum of \$1,743.65.

The court is of the opinion that a full and careful reading of the three cases cited will disclose that very objection raised by defendant's counsel in his brief is met and answered in those cases. On the question of the settlement with the commissioners and its conclusiveness upon the county prosecutor or the county it will be seen that this question was raised and settled against defendant's contention in the case of *Higgins v. Comrs., supra*. There the county sued one of the ex-commissioners to recover for mileage and expenses *in excess* of what he was entitled to by the statute. He pleaded that the accounts were examined by the prosecuting attorney and probate judge of Logan county and duly certified and approved by them, and that thereupon the county commissioners of said county adjudicated upon and allowed said claim and ordered the county auditor to issue his warrant upon the county treasurer, which was done. Nevertheless the trial court charged the jury that if they should find that the defendant drew moneys from the county treasury * * * either as mileage or expenses or both for days while he was exclusively engaged in the office of the board in the discharge of his duties as commissioner * * * other than mileage for one day each month, then such allowance and receipt by him was illegal and in violation of the statute of Ohio * * * and for such illegal mileage and expenses so received the plaintiff is entitled to recover. The Supreme Court sustained this charge and on page 629 say:

"The recovery in this case was for moneys received by the plaintiff in error as a county commissioner in excess of any allowance that might lawfully be made to him by the terms of this section 2591, and the claim therefore should not have been allowed to him by the commissioners."

The cases of voluntary payment cited by counsel for defendant in his brief mostly relate to individuals or private corporations dealing with one another or with public corporations, and not transactions of one public servant dealing with another public servant in reference to their compensation or salaries. Note what Judge Spear says in *Jones, Auditor, v. Commissioners, supra*, on pages 211 and 212:

"It is urged that as a condition of avoiding the conclusive effect of the commissioners' allowance there must be found either fraud or mistake, and neither is averred. This claim seems to rest on the idea that the board of commissioners is practically the county and that its official acts necessarily conclude the county. The assumption is fallacious."

He then proceeds to cite authorities to show the character of the commissioners and that the board of commissioners no more represents or stands for the county or is the county than any other county official, and on page 214 says:

"That is to say referring to claims other than those of auditors, if the amount is fixed by law or is to be fixed by some other tribunal, then the commissioners may not act," etc.

And on page 216 uses this language:

"Giving this construction to the statutes we conclude that the board (of commissioners) being a creature of statute an agent whose powers are not general but special, should be held to represent the county in respect to its financial affairs, only in such matters as are distinctly provided by statute."

In *Richardson v. State, ex rel, supra*, the court in speaking of the effect of the allowance of a claim by the commissioners says on page 113:

"Such an allowance when no illegality appears on the face of the claim may be sufficient to justify the treasurer in its payment, unless it is paid with knowledge of its infirmity otherwise

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obtained, but it can not operate to protect the person who unlawfully received the money, nor deprive the county of its right to recover back the money when it has been unlawfully obtained from the treasury."

It is urged in the case at bar that there has been no offer to return the salary or the \$18 paid to the county by defendant.

The county has nothing of defendant's to pay back or tender back. The salary did not belong to defendant. He had no right to draw it. It was the county's money illegally drawn from the treasury by the defendant, and even if the defendant had actually repaid it and had not been allowed any fees he could by no legal claim ask the county to turn his salary over to him before calling upon him to return to the county illegal fees and mileage in his possession. As to the \$18 this is but a part of the illegal salary or fees and mileage in the possession of the defendant which he has paid to the county, a part of its own money, and surely it would be a vain thing to require the county to turn over this \$18 to defendant, when, if it did so, it would be entitled to a judgment against him for \$18 more than it is now claiming. In other words, the \$18 is but a small part of the illegal salary drawn and the remainder has not been turned over and only the difference between the legal compensation and the illegally drawn salary, is sought to be recovered.

**DEFENSES OF GENERAL DENIAL AND CONTRIBUTORY
NEGLECTANCE MAY BE COMBINED IN
THE SAME ANSWER.**

Common Pleas Court of Franklin County.

E. LILLIAN FRUCKEY V. ELI M. WEST, RECEIVER.

Decided, May 9, 1911.

*Pleading—Purpose of—General Denial and Contributory Negligence
Are Inconsistent Defenses But Are Permissible—Developments of
the Trial May Be Relied On to Disclose which is the True Defense.*

While a general denial is inconsistent with the defense of contributory negligence, it is not the policy of the law to deny to a defendant the right to prove contributory negligence unless he first admit his

own negligence, and a motion to strike the second defense from an answer containing a general denial and also averring contributory negligence, on the ground that it is a sham pleading, must be overruled.

Pugh & Pugh and Frank Monnett, for plaintiff.

Harry F. West, contra.

DILLON, J.

This is an action for damages on behalf of the next of kin of decedent who, it is alleged, has suffered by reason of the negligence of the defendant in the operation of an interurban railway.

The answer of the defendant is divided into three parts. The first defense is a general denial of negligence. Second, this is followed, though not numbered as a defense, by a statement that the injury and death was caused by the fault and negligence of the decedent himself.

This last defense is unnecessary, although it is not prejudicial and need not be stricken out. Under a general denial of negligence the burden is upon the plaintiff to prove the injury to have been caused substantially in the manner as charged, and by general denial that burden does not shift, and, therefore, if it were caused in any other way, that is to say, caused by some third person or caused by the sole negligence of the decedent himself, those facts may be shown under a general denial. The defendant, then, under the head of second defense, says that if it should appear at the trial of this cause that the defendant had been guilty of negligence in the manner charged in the petition, the decedent himself was guilty of negligence, directly contributing to said injury and death in this, to-wit, that without exercising care to avoid a collision, he walked directly against the car of the defendant.

To this answer the plaintiff interposes several motions; first, to strike out the statement above referred to that the injury was caused by the sole negligence of the decedent, but which, as the court has above remarked, is not prejudicial and is not of sufficient importance to warrant a new pleading. The plaintiff further moves to strike out the entire second defense on the ground that it is a sham pleading and inconsistent with the first

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defense. The theory of this motion is that the two defenses are inconsistent with each other, and that both can not be true. This premise must be granted in so far as the pleading is concerned. for it is manifest that if a defendant be not negligent, contributory negligence is an impossibility.

The question is interesting and is one which of late has been causing considerable confusion to the bar of the state. This confusion was not aided any by the decision found in 73 O. S., 1, but in construing pleadings, we must remember they are solely to advise the respective opponents of the evidence which may be adduced. While it has often been remarked, yet it is not literally true, that the jury trying the case must arrive at and declare the truth in that case. Verdicts are based upon probabilities, and a litigant is always subject to the disaster of not having the truth ascertained and declared by reason of misfortune in reference to his own evidence or error in respect to his opponent's evidence. It would, therefore, be highly inequitable on matters like the one at bar, involving an accident which suddenly occurs, and especially in the absence of the parties actually sued, to say that such parties must at their own peril determine in advance just what the jury will find to be the greater weight of the evidence, *i. e.*, the probabilities in the case,

Men differ as to the standard of care which shall govern one in his conduct. Juries so differ and courts so differ. How farcical, therefore, and impracticable, for courts in the niceties of pleading to hold that a man must know in advance and thus place a lawsuit somewhat upon the plane of a legal game. Personally, I have always been of the opinion that under a mere general denial, if the facts as developed at the trial show contributory negligence, that it is the duty of the court in the administration of justice to so charge the jury and to give to the jury the law with respect thereto. This view I think is sustained by considering that since the plaintiff must recover upon the ground stated in his petition. if it appear that the injury was caused in some other way, he can not recover, because the burden on him can not possibly shift. If, therefore, an injury is caused not by the negligence of the defendant but in some other way, to-wit, by the negligence of two persons, the plaintiff and the defendant, it is no different

than if it had been caused by the negligence of some third person who is not a party to the suit. It certainly can not be the policy of the law to deny to a defendant the right to show and prove contributory negligence unless he will first admit his own negligence.

Compare the alternative pleading here with the one involved in the case of *Citizens' Bank v. Closson*, 29 O. S., 78, where the action is upon a promissory note. The defenses were, first, a general denial of ever having executed the note, and, second, that if it should be determined that the signature to the note was genuine, it was obtained by fraud, and further that there was no valid consideration therefor. Affirming a reversal of the common pleas court, the Supreme Court holds the defendant had a right to insist upon these grounds of defense, and that it was error for the trial court to compel him to elect upon which he should rely, and on page 81, the court says:

"Taken together, the two defenses amount to this: That the defendant is ignorant whether he signed the note or not; he does not believe he signed it, and therefore denies it; and that, if he did sign it, his signature was obtained by fraud, and without consideration. * * * It certainly is not consistent with the spirit and intention of the code that a party having one or the other of two good defenses, without the means of knowing, otherwise than from the developments to be made upon the trial, which of the two, in fact or in law, is his true defense, shall, at his peril, be compelled to elect in advance on which he will rely, to the exclusion of the other. When, from the nature of the case, it is rendered uncertain which of two grounds of defense is the true and proper one, it is competent for the defendant, in his answer, to set them both up, provided they will admit of being stated in such form, that the answer can be sworn to without falsehood, and in good faith."

' The motions to the answer will be overruled.

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Papner v. Harmon, Receiver.

WOMAN STRUCK AT A RAILWAY CROSSING.

Common Pleas Court of Hamilton County.

**FRED PAPNER, ADMINISTRATOR OF MARGARET PAPNER, DECEASED,
v. JUDSON HARMON, RECEIVER OF THE CINCINNATI, HAM-
ILTON & DAYTON RAILWAY COMPANY.**

Decided, December, 1910.

*Negligence—Weight of Evidence as to, at a Railway Crossing—Night
Dark and Foggy—No Bell or Whistle Sounded—Pedestrian Struck
by Train—Verdict Against Railway Company Upheld.*

Where the automatic bell at a railway crossing does not ring and neither the locomotive whistle nor bell is sounded, a presumption arises that no train is approaching, and if the air was full of smoke and the night so dark and foggy that the engineer whose locomotive struck the decedent at the crossing, although looking ahead where the deceased must have been, did not see her or know until the next day that any one had been struck, the question as to whether the decedent should have seen the approaching train is not sufficiently clear to require that a verdict in favor of her administrator should be set aside.

Otto Pfleger and F. E. Niederhelfman, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, contra.

HUNT, J.

Plaintiff's intestate was killed on March 13, 1907, between eight and nine o'clock P. M. by defendant's train, at the Dreman street crossing in Cincinnati. Defendant's railroad is a double track at that place and Dreman street is improved with curbing and a brick pavement. It is the outlet of a limited locality. The deceased lived on the north side of Dreman street west of the railway, and was returning home after being at the grocery located on the south side of Dreman street, about eighty feet east of the railroad. The night was dark, rainy, somewhat sleety, foggy, with a strong wind blowing in gusts from the west. There is some evidence that a freight train had passed south immediately before the accident. Plaintiff had a shawl over her head and was carrying an open umbrella held unsteadily in such

a way as to protect her from the west wind. The deceased had crossed Dreman street to the north and was about to cross the railway when she was struck and carried some one hundred feet north and thrown on the easterly side of the railroad.

There was neither watchman nor gates at the crossing, and although there was an automatic alarm bell there, it seems to have been out of order. There was evidence tending to prove that the whistle of the approaching train was not blown for the crossing and that the engine bell was not rung; also evidence by the defendant to the contrary. The engine had an electric headlight, which defendant's evidence shows to have been lighted. The train was an express train going north, running at its usual rapid rate of speed and upon its regular time. The train crew knew nothing of the accident until a day or so afterwards, although the engineer says he was seated on the right or easterly side of his cab and was keeping a lookout ahead. The track for at least one-half mile in the direction in which the express train approached was practically straight, and except for the smoke of the freight train, if any passed, the rain, sleet, fog and the usual darkness of night, the train could have been seen if the deceased had looked, at any time while she was within fifty or twenty-five feet of the tracks.

The question as to whether under the circumstances the defendant should have maintained a watchman, or gate, or both, the want of repair of the automatic bell, the plaintiff's evidence as to the failure to whistle or ring for the crossing, and the speed at which the train was run, under the circumstances clearly made the issue as to defendant's negligence an issue to be determined by the jury, and when so determined a final determination.

The issue as to the negligence of the deceased is not so clearly an issue to be determined by the jury, and when so determined is not so clearly a final determination.

The defendant relies on what is claimed by him to be the fact, to-wit: that if before the deceased had entered the zone of danger and while she was anywhere within at least twenty-five feet of the track, she had looked in the direction of the approaching train, she could not have failed to have seen the approaching train, and that therefore the fact that she was struck under such

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circumstances, conclusively establishes the fact that she did not look and was therefore negligent.

It may be conceded for the purposes of this case that the duty to look in the direction of a probably approaching train is absolute, and that for a pedestrian to be struck by a rapidly moving train, the dangerous proximity of which he could have seen, is conclusive evidence that he did not look. The rule may be different with the driver of a vehicle. Both driver and pedestrian in the exercise of ordinary care can use means to protect themselves from the weather. Both in the exercise of ordinary care, not being advised of an approaching train by signal or other methods ordinarily used by prudent railroad men, may approach the track at the crossing, but the driver under such circumstances may find that he can not retreat, and being confronted, without negligence on his part but by negligence of the railroad company, with two dangers, one from the approaching train if he crosses, and one from the action of his horse if he stops so near the passing train, the fact that he chose to cross, although ordinarily but not always the most dangerous, is not conclusive evidence of negligence on his part. The pedestrian is ordinarily confronted with only one danger up to the time he actually gets in the way of the approaching train.

Under the circumstances of this case it does not necessarily follow that the deceased would unquestionably have seen the train. In answer to defendant's interrogatories the jury has specially found otherwise up to the time she was within five feet of the track. Under ordinary circumstances she would have seen the train as defendant claims, but there is evidence that the conditions were not ordinary. If the automatic bell was not rung and there was neither whistle nor engine bell for the crossing, the deceased to a certain extent had a right to presume that no train was coming, and the night being so dark, rainy, sleety, foggy and gusty, that the engineer, looking ahead in the area lighted by the electric headlight, in which area the deceased must have been, did not see the deceased, the question as to whether the deceased could have seen the approaching train is not so conclusively and affirmatively decided by the admitted circumstances of the case as to make such question a mere question of

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law, not so manifestly contrary to the weight of the evidence as to require the finding of the jury thereon to be set aside by the trial court, especially as under our system of procedure the plaintiff and the defendant have not equal rights to have the findings of the trial court upon the weight of the evidence reviewed by the circuit court.

The motion to set aside the verdict of \$2,000 for the plaintiff is therefore overruled.

BUILDING AND REPAIR OF COUNTY ROADS.

Common Pleas Court of Franklin County.

THE STATE OF OHIO, EX REL THE TAX COMMISSION OF OHIO, v.
FRED M. SAYRE, AS AUDITOR OF FRANKLIN COUNTY, OHIO.

Decided, October 28, 1911.

Taxation—Levies for Roads—Construction of the Emergency Section of the Smith One Per Cent. Tax Law—Discretion of County Commissioners as to an Additional Levy—102 O. L., 266.

The expense of constructing, re-constructing, repairing and maintaining county roads made necessary by emergency may be met by county commissioners in their discretion by a levy in excess of the limitation fixed by the general taxing statute.

Timothy S. Hogan and Clarence D. Laylin, for plaintiff.
E. C. Turner and H. C. Sherman, contra.

DILLON, J.

This action involves the construction and interpretation of Section 4 of the act of May 10th, 1910 (101 O. L., 430). This section was left intact and unrepealed in the passage of the so-called Smith One Per Cent. Law (102 O. L., 266).

The relator complains of the action of the county commissioners of Franklin county, taken on September 2, 1911, whereby the said commissioners by resolution declared it to be necessary to raise \$87,000 for the purpose of providing funds for the construction, re-construction, repair, maintenance, etc., of one hundred and fifty-eight free turnpikes and improved roads in

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said county, and ordering that a levy of three-tenths of one mill be made to provide said fund, in addition to the ordinary levies authorized by law.

Relator issued an order to the auditor of Franklin county, instructing him to refuse to obey this order or to certify or enter any such levy. It asks that he be compelled to obey this order and also that he be enjoined from entering the levy upon the duplicate.

Section 4, above referred to, provides as follows:

“For the emergencies mentioned in Sections 4450, 4451, 5629, and 7419, of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor, irrespective of any limitations of this act.”

The so-called emergencies referred to in the four statutes provide for the raising of money in cases of epidemic or threatened epidemic, or the unusual prevalence of a dangerous disease, or of injury or destruction by fire to certain county buildings, and last of all, as provided in Section 7419:

“When one or more of the principal highways of a county or part thereof have been destroyed or damaged by freshet, landslide, wear of water-courses, or other casualty, or by reason of the large amount of traffic thereon, or from neglect or inattention to the repair thereof, have become unfit for travel, or cause difficulty, danger or delay to teams passing thereon, and the commissioners of such county are satisfied that the ordinary levies authorized by law for such purposes will be inadequate to provide money necessary to repair such damages, or to remove obstructions from or to make the changes or repairs necessary from the causes herein enumerated, they may annually thereafter levy a tax at their June session not exceeding five miles upon the dollar,” etc.

The Attorney-General contends that the word “emergencies” as used in Section 4 is not a general term applying to all the conditions set forth in the statutes foregoing, but that it is the duty of the court to determine just which ones of the conditions named in Section 7419 are actual emergencies, and which one or more of those conditions are not real emergencies.

I am of the opinion that the Legislature in using the word “emergencies” in this case referred to all the conditions and

situations enumerated in the statute as a class, and did not intend thereby to leave it open to judicial interpretation as to which ones could be considered emergencies in the strictest sense of that term, and which ones not. If the Legislature had any such intent, it certainly would not have used the language in the form it has to express it.

Section 7419 sets forth a number of causes which place it within the power of the commissioners in the proper exercise of their discretion to exceed the limitations provided by the general taxing statute, and it is not fault of the courts if this statute was designedly made broad for the very purpose of enabling such additional levies.

The word "emergencies" as used by the Legislature in Section 4, therefore, means an exigency, or an urgency, a condition of pressing necessity, a need, a situation which demands prompt action, and the condition of the roads enumerated in Section 7419, from the causes therein mentioned are to my mind clearly within the meaning which the Legislature gave in Section 4.

There is some complaint also in this case that the resolution was indefinite, in that it was a blanket resolution, without specifying each road separately and enumerating the particular cause of the condition of each road. There is no statute which requires any such specification, and the fact that the commissioners embraced all the roads in one general blanket resolution does not void the resolution.

Other questions were raised at the trial, but I believe counsel agree that if the foregoing interpretation of the statute is the one to be adopted by the court, no further question need be presented.

The motion of the plaintiff, therefore, for a judgment on the pleadings is overruled, and a judgment will be entered dismissing the petition at the costs of the relator.

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Heinrichsdorf v. Stengel.

"MUTUAL MISTAKE."

Common Pleas Court of Hamilton County.

OTTO HEINRICHSORF V. GEORGE STENGEL ET AL.

Decided, July 6, 1911.

Contracts—Agreement Not Varied on the Ground of Mutual Mistake, Unless—What Constitutes a Mutual Mistake—Parol Evidence to Vary a Written Instrument.

1. A "mutual mistake" is one wherein both parties agree that the mistake occurred; or, is in law that situation which arises wherein "very clear and satisfactory evidence" shows that while one party denies such mistake, nevertheless the intent of the parties to a contract is not expressed in its terms.
2. Under the mere plea of a "mutual mistake" a party should not be permitted under any and all circumstances to give evidence seeking by parol to vary the terms of a written instrument.
3. Were parties under any and all circumstances to be permitted to plead a "mutual mistake" and thereunder seek by parol to vary the terms of a written contract, the rule prohibiting the changing of written contracts by parol would practically be abrogated.

Otto Pfleger, for plaintiff.

Ben B. Dale, contra.

O'CONNELL, J.

Plaintiff brought suit against the defendant for commissions earned while in defendants' employ as a salesman. He was acting as such under a written contract between the parties whereby he was to have the exclusive right to sell within certain specified territory. He was to receive commissions on all goods sold within that territory during the term of his employment.

Defendants for answer say that the sales to certain firms within that territory were not included and that by "mutual mistake" the names of such firms were omitted from the written contract.

The ordinary rule of law is that parol evidence can not be admitted to alter or vary the terms of a written instrument whose terms are as clear and unambiguous as is the written

contract between these parties. However, in certain cases "mutual mistakes" are permitted to be shown.

The definition of the word *mutual* is clear and unmistakable. A mistake to be "mutual" must be the mistake of *both* parties. A "mutual" mistake does not arise where one party insists that the contract expresses the agreement of the parties, while the other party claims that all which the parties intended was not placed in the written contract.

At the trial of the case, defendant over the objection of the plaintiff was permitted to offer the evidence which he claimed tended to show that the mistake was mutual, and what the contract between the parties really should have been. At the conclusion of all the evidence the court directed the jury to return a verdict for the plaintiff on the ground that defendant had failed to bring his case within the exceptions to the rule regarding the introduction of parol evidence to vary the terms of written instruments.

In support of his motion for a new trial counsel for defendant cites a number of cases in support of his contention. His leading case is that of *Davenport v. Sovil*, 6 O. S., 459. The syllabus of that case is as follows:

"S, with his wife, executed to D a mortgage to secure a debt, and died. On condition broken, D, proceeding against the widow and heirs of S, obtained a decree for sale, bid in the premises, sale confirmed, and deed made to D for the premises described in the mortgage. It is then first discovered that, by mutual mistake of the parties, the description in the mortgage did not embrace the land intended to be mortgaged, and which S did own, but embraced other land, which S did not and never claimed to own. *Held*—

"Parol proof is competent to establish such mistake, and the mortgage may be reformed and enforced in the same proceeding.

"The presumption being that the contract, as reduced to writing, embodies the real intention of the parties, courts ought not to proceed on the ground of mistake, without very clear and satisfactory proof of its existence.

"The mortgage, as reformed, is not merged in the former decree; and as the original mistake infects all the subsequent proceedings, they are nugatory."

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At pages 461-462, Judge Brinkerhoff says:

"It is hardly possible to imagine a case resting on stronger or clearer principles of natural equity than that made by the petition and admitted by the demurrer. The plaintiff ought, unquestionably to be relieved, unless in the peculiar position in which an innocent and not unfrequent mistake has placed him, he is precluded from its attainment by some inexorable rule of law. * * *

"The plaintiff, alleging a mutual mistake of the parties in the description intended to identify the entire subject-matter of the mortgage—a mistake vital to the entire contract—seeks, on the ground of that mutual mistake, to reform the contract, so as to make it what the parties intended and justice required it should be, and what, had no mistake of fact occurred, it would have been; and then to enforce the contract thus reformed. Whether this can be done, is the first question to be considered."

And on page 464, the court reached the following conclusion:

"Contracts concerning land, then, may be reformed, on the ground of mutual mistake of the parties to them; and when thus reformed, may, in the same proceeding, be enforced; and such mistake may be proved by parol. But it ought not to be forgotten that the contract, as committed to writing, is properly presumed to be the best evidence of the real intention of the parties, and therefore, before courts proceed to administer a remedy for the alleged mistake, they should require its existence to be established by very clear and satisfactory evidence."

The court in this decision appeared loth to depart from the rule prohibiting oral modifications of written contracts. But the peculiar circumstances of the case taken in connection with the fact that the defendant admitted the fact of the mutual mistake through a demurrer to the petition, led them to make the decision. They further stipulate in the decision that, "contracts concerning land, then," etc.

In the case at bar the controversy is not concerning land. The mistake is not admitted by the plaintiff to be mutual, but he strenuously denied that there was any mistake. The evidence as to a mistake was not "very clear and satisfactory."

Counsel for defendant further cites the case of *Platt v. Scribner*, 18 C. C., 452, as one holding that parol evidence may be

introduced to vary the terms of a written instrument. But the second paragraph of the syllabus, which is as follows, shows it to be inapplicable to the case at bar.

“Syllabus 2. Where it evidently appears from the written instrument that only a part of the terms are expressed therein, parol evidence is admissible to show other terms not inconsistent with those expressed; and where no consideration for the contract appears in writing, the fact that there was a consideration may be proven orally.”

No such state of facts exists with reference to the contract in controversy. No other authority cited bears out defendant's contention.

Were parties under the guise of a “mutual mistake” to be permitted under any and all circumstances to seek to avoid the terms of a written contract by undertaking to prove some other stipulations which they claim should be included, it would be well nigh impossible to maintain the rule that written contracts can not be varied by parol.

Where one party to a written contract insists that the instrument correctly represents the agreement of the parties as made, a court should not allow the other party under the plea of a mutual mistake to alter or to amend the contract when his evidence discloses the fact that but for his own carelessness or lack of foresight, the disputed provision might have been inserted in the contract. There was no element in defendants' case which justified a modification or departure from the established rule.

The motion for a new trial should be overruled.

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Gaughan v. Slanski.

JURISDICTION OF THE MUNICIPAL COURT OF CLEVELAND.

Common Pleas Court of Cuyahoga County.

P. W. GAUGHAN v. S. F. SLANSKI.

Decided, June 17, 1912.

*Construction of Section 1579-6—Conferring Jurisdiction by Reference—
Application of the Exemption as to Householders and Freeholders
Found in Section 10225.*

The jurisdiction of the municipal court of Cleveland is limited, in civil cases, to residents of said city and to such residents of the county ~~outside of the city as~~ are not householders or freeholders and are served with process when within the corporate limits.

Gaughan & Collins, for plaintiff.

Fred Deebang, contra.

PHILLIPS, J.

This case presents the question whether a householder or freeholder, resident of this county, but non-resident of the city, is immune from the jurisdiction of the municipal court of Cleveland, in civil cases.

The act conferring jurisdiction upon the municipal court gives it "original civil jurisdiction within the limits of the city * * * in all actions and proceedings of which justices of the peace have, or may be given, jurisdiction." 102 O. L., 156.

By Section 10223 of the General Code, the territorial jurisdiction of justices in civil cases, unless otherwise directed by law, "is limited to the township wherein they have been elected, and wherein they reside."

Section 10224 enumerates twelve instances in which their jurisdiction shall be co-extensive with the county.

Section 10225 says:

"Except as provided in the next preceding section, no householder or freeholder, resident of the county, shall be held to answer a summons issued against him by a justice in a civil matter in any township of such county other than the one where he resides, except in the cases following:" (Here follow six exceptions to the limitations just stated.)

The municipal court act confers jurisdiction by reference to another statute. There are two ways of adopting an existing statute into the provisions of a new act. One is by specific and descriptive reference to the statute or provisions adopted, whereby the statute or provisions adopted are incorporated bodily into the adopting statute. The other form of adoption is by reference, not to any particular statute or part of a statute, but by reference to the law generally which governs a particular subject. The latter is the method adopted in this instance.

This being so, we are to determine what was adopted into the new act, not by what is known as "close interpretation" of a single statutory provision, but by a comprehensive view of the statutes *fixing* (both by conferring and by restricting) the jurisdiction of justices of the peace.

The Constitution makes a justice of the peace a township officer; and the statute (Section 10223) fixes his territorial jurisdiction, primarily, within the township where he is elected and resides. In like manner, the act of May 10, 1911, fixes the territorial jurisdiction of the municipal court, primarily, within the corporate boundaries of the city of Cleveland.

If the law that has been adopted by reference, as aforesaid, would, in a particular instance, limit the jurisdiction of a justice in respect of persons without his township, it follows as an obvious corollary that in the like instance, the jurisdiction of the municipal court must be limited in like manner.

Where a court has jurisdiction of the subject-matter of an action, jurisdiction of the *person* of a defendant can be acquired, *in invitum*, only by service of the process of the court, and service of process can be made only within the territorial jurisdiction of the court issuing it. But the well-settled general rule is, that in transitory actions, service of process, made within the territorial jurisdiction of the court issuing it, upon a non-resident of such territory, subjects him to the jurisdiction of the court. And this rule applies to a justice of the peace, unless changed by statute. I think the quoted part of Section 10225 is intended to, and does, exempt householders and freeholders

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who are residents of the county, but non-residents of the particular township, from the application of this general rule; and to this extent it limits the jurisdiction of a justice of the peace, and likewise that of the municipal court.

This section is one of ten sections of the justice's code defining and fixing the jurisdiction of that court. These sections abound in restrictions and limitations; and these negative provisions must be considered with the affirmative provisions, and the jurisdiction determined as well by what powers are expressly withheld as by those expressly conferred.

Considering these statutes in this way, I think the provision in Section 10225, that "no householder or freeholder, resident of the county, shall be held to answer a summons issued against him by a justice in a civil matter in any township of such county other than the one where he resides," does not merely confer upon such non-resident a privilege to be asserted or waived by him, but fixes, by limitation, the jurisdiction of the justice; and this limitation is, by adoption, made applicable to the municipal court, and operated to deprive it of jurisdiction of this plaintiff in error.

Judgment reversed, with costs.

TRANSPORTATION EXPENSES INCURRED BY SHERIFFS.

Common Pleas Court of Franklin County.

STATE OF OHIO, EX REL ALBERT F. SARTAIN, AS SHERIFF OF
FRANKLIN COUNTY, OHIO, v. FRED M. SAYRE, AUDI-
TOR OF FRANKLIN COUNTY, ET AL.

Decided, October 16, 1911.

*Allowances to Sheriffs—May Include Automobile Hire, When—Term
"Livery Hire" Construed—Words and Phrases—102 O. L., 93.*

It is within the discretion of county commissioners to make an allowance to the sheriff for automobile hire, incurred in and necessary to a proper administration of the duties of his office in the service of writs and processes or in pursuing or transporting persons who are wards of the state or are charged with crime.

J. H. Dyer, for plaintiff.

E. C. Turner, contra.

RATHMELL, J.

The question arises on demurrer to the petition praying that a writ of mandamus issue commanding Auditor Sayre to issue and deliver a warrant in favor of relator on the treasurer of Franklin county, covering automobile livery hire, alleged to have been incurred and necessary for the proper administration of the duties of his said office in serving such writs and processes as were directed to him as such sheriff.

It appears from the petition that relator filed a full accurate, itemized and verified account of said livery with the board of county commissioners as a part of his last quarterly report; that the same was approved and allowed by said board and that a voucher was issued to him for the payment of said livery bill in the sum of \$420; that same was presented to defendant, Sayre, Auditor, with request for a warrant on the treasurer for its payment and same was refused.

That said automobile livery was engaged from one Charles W. Engle, who, at the time, was engaged in the business of letting automobiles for hire.

It is provided in Section 2997, General Code, as amended April 26th, 1911 (102 O. L., 93), that in addition to his compensation and salary, the commissioners shall make an allowance to the sheriff quarterly (among other things) for all expense of maintaining horses and vehicles necessary to the proper administration of the duties of his office. And may allow his necessary *livery hire* for the proper administration of the duties of his office.

It is the contention of counsel for defendants that the phrase "livery hire" as used in the statute does not include the hire of automobiles; and can not apply to any expenditure for the hiring of horseless vehicles.

It is not questioned that an automobile is a vehicle which is subject to hire.

Does the expense account claimed fairly come within the provision for the allowance which may be made for necessary *livery hire*?

The statute mentioned has for its subject-matter the expense of the sheriff incurred and expended in pursuing or transporting

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persons accused and convicted of crimes and offenses; conveying and transferring persons to and from certain institutions and places mentioned in the statute; and for the proper administration of the duties of his office, serving civil process, subpoenaing witnesses and the like. In this connection allowance may be made for necessary *livery hire* for the proper administration of the duties of his office.

It appears clear that by the intent of the statute that *livery service* necessary for the proper administration of the duties of the sheriff's office may be paid for by the commissioners.

The word "livery" is used in a number of senses. As the expenses for conveying certain persons and papers is prominent as subject-matter of the statute, it would appear clear that the necessary services imposed by the statute and obtainable from a livery man is the sense in which the word is used.

The Standard Dictionary defines "livery" in one of its accepted senses as "the keeping of horses and vehicles ready for hire." A liveryman is one who keeps a "livery stable." "A *livery stable* is a building where horses or vehicles are kept or let for hire" (19 A. & E. Ency. of Law, 430). A livery stable "a place where horses and vehicles are kept for hire" (Eng. L. Dict.).

From these definitions it would appear that as "livery" pertains to the keeping of horses and vehicles ready for hire, or the keeping of horses or vehicles ready for hire, that to constitute "livery hire" it is not necessary that both horses and vehicles be connected with the letting or transaction; that the hire of a horse from a liveryman can constitute "livery hire," within the unstrained meaning of the definition; and the hire of a vehicle would likewise constitute "livery hire."

It is not uncommon that liverymen keep and maintain automobiles, in connection with horses and carriages, for hire to their customers. And automobiles are maintained alone in stables or buildings for hire.

In 28 Cyc., 42, the following definition appears: "The public garage is the modern substitute for the livery stable, and may

be defined as a building or inclosure for the care and storage of motor vehicles and in which motor vehicles are kept for hire."

Section 13130, General Code, where penalty is provided against hiring certain animals or vehicles with intent to defraud the owner or keeper of a livery stable, "automobile" is mentioned as one of the vehicles within the range of such hiring, which lends some support to the claims than an automobile is there recognized as a proper subject of a liveryman's business, and hence a subject of "*livery hire*."

An automobile is a vehicle; but to insist that "vehicle" in the definition of "livery" is limited in meaning to horse-drawn vehicles, seems hardly warranted in modern usage of the word.

I am of the opinion that the expense account claimed, and incurred or alleged, comes fairly within the spirit, provision and intendment of the statute mentioned as "livery hire," and thereunder within the commissioners' discretion for allowance.

The demurrer is therefore overruled.

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**DEFECTIVE GRANT OF RIGHT TO APPROPRIATE EASEMENT
FOR ELEVATED RAILWAY TRACK.**

Common Pleas Court of Hamilton County.

**THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN
ERROR, v. THE CITY OF CINCINNATI ET AL,
DEFENDANTS IN ERROR.***

Decided, November 7, 1911.

Terminals for Transportation Uses—Easement for an Elevated Railway Across a River Landing—Condemnation of, Permissible—Procedure Necessary to Render Grant of Right to Appropriate Valid—Discretion of Council as to Terms and Conditions Must Be Exercised—Paramount Use—Sections 3283, 3283a, 6415 and 6420.

1. Authority to appropriate an easement across a public landing, lying within a municipality, for the purpose of erecting thereon an elevated railway, is granted by Section 3283a, Revised Statutes, but in making such an appropriation it is necessary to follow the procedure laid down in Title II, Chapter 8, Part 3, Revised Statutes.
2. An ordinance granting to a railway the right to condemn such an easement is void, if not based upon an agreement between the railway company and the municipality wherein the discretion of council has been exercised as to the terms and conditions and limitations under which the grant is made.
3. Such an ordinance, where it deals with streets and the public landing, deals with two distinct subjects, and is invalid on that ground.
4. Whether the rule of law, that as between a railway and a navigable river the use of land for the purposes of navigation is paramount to its use for railway purposes, is applicable to the terminals required for these respective means of transportation—*Quære*.

J. B. Foraker and Kinkead & Rogers, for the railroad company.
E. M. Ballard, City Solicitor, *Albert Bettinger* and *Walter Schmitt*, for the city.

Hosea & Knight, for the property owners.

* *Affirming Railway v. Cincinnati*, 10 N.P.(N.S.), 649.

CUSHING, J.

The plaintiff in error filed a petition in the Insolvency Court of Hamilton County seeking to appropriate an easement over and across the streets and public landing, beginning at the east side of Broadway and extending west to the west line of Main street in the city of Cincinnati, for the purpose of erecting thereon an elevated railroad; the said railroad to extend from the company's main track at its Newport and Cincinnati bridge to a tract of land owned by it, lying west of Vine and south of Water streets in Cincinnati. The land in question is to be used by the railroad company for yard and freight depot purposes.

The court below dismissed the petition of the railroad company, and it now prosecutes error to reverse the finding of that court on the preliminary questions there presented.

In the court below, the railroad company did not offer any evidence tending to establish its inability to agree with the city of Cincinnati as to the value of the easement it sought to appropriate, nor did it offer any evidence of the necessity for the appropriation.

Counsel for the railroad company contend that the city of Cincinnati has no power to agree with the railroad company as to the amount of money the company should pay for the easement it seeks to appropriate. This contention is based on a decision of the Supreme Court of Ohio, which will be considered hereafter.

Counsel for the railroad company also contend that it was not necessary to offer evidence under the fourth division of Section 6420, Revised Statutes, and assigned as a reason therefor that the Legislature of Ohio vested in the directors of the railroad company the power to determine the question of said necessity, that their determination is final and the court has no power to consider that question.

Counsel for the city of Cincinnati contend that the ordinance of the city council is invalid: first, because it contains two distinct subjects of legislation; and second, in that it does not specify any terms and conditions for the occupancy of the city's property and that it includes property not dedicated to the city for a public landing.

Counsel for interested property owners argue that Section 3283a is unconstitutional.

In determining the questions here presented, it will be necessary to consider the case of *The Louisville & Nashville Railroad Company v. City of Cincinnati*, 76 O. S., 481; the case of *City of Cincinnati v. The Louisville & Nashville Railroad Company*, 9 N.P.(N.S.), 433; and Sections 3283, 3283a, 6415 and 6420, Revised Statutes.

The source of all power of eminent domain is so well understood in this country that it would not be necessary to re-state it here if it were not for the fact that counsel seem to differ as to the extent of the power vested in this corporation by the Legislature. The state has a right in and a control over all highways, streets, alleys, avenues, public grounds, landings and wharves of whatever character or description, superior to that of any subdivision of such state, such as counties, townships and municipalities.

“Public streets, squares, landings and grounds are * * * under the absolute control of the legislative power of the state.” *Louisville & Nashville Railroad v. City of Cincinnati*, 76 O. S., 481.

The power to appropriate property for public use under the law of eminent domain is in the state. That power is inherent in the state. The state may vest the same power in municipalities, in corporations public or private, and in some instances the same power may be delegated to private citizens. Such municipalities, corporations and citizens have only such power to appropriate property under the law of eminent domain as is delegated to them by the state. This delegation of power must be either in express terms or by necessary implication.

The Legislature, by duly enacted laws, has delegated to railroad companies, under eminent domain, the power to appropriate three classes of property: first, private property; second, such public property as falls within the class specified in Section 3283, Revised Statutes; and third, such other public property as is specified in Section 3283a, Revised Statutes.

Section 3283. “If it be necessary, in the location of any part of a railroad owned or operated by a domestic or foreign cor-

poration to occupy with a surface or elevated track, with the necessary supports therefor, any public road, street, alley, way or ground of any kind, or any part thereof, the municipal or other corporation or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms and conditions upon which the same may be used or occupied, and in the event of the occupancy of any such ground with an elevated track such agreement shall specify the number, character and location of all supports for such track, any part of which shall be upon such public ground, and the vertical and longitudinal clearances between such supports, and if the parties be unable to agree thereon, and it be necessary in the judgment of the directors of such company, to use or occupy such road, street, alley, way or ground, or any part thereof, for surface tracks, or for crossing with an elevated structure when no piers, supports, or obstructions are to be placed therein; such company may appropriate so much of the same as may be necessary for the purposes of its road in the manner and upon the same terms as is provided for the appropriation of the property of individuals; but every company which lays a track upon or over any such street, alley, road or ground, or part thereof, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner before the proper court, at any time within two years from the completion of such track. Provided, that nothing in this act contained shall be construed as authorizing the grant of the right to occupy any public street, avenue or alley, longitudinally by an elevated track, except in so far as the same may be necessary to accommodate a curve in the line of the elevated track, and in that case no supports shall be placed in the roadway of the street, avenue or alley, between the curb lines thereof, and in no case shall such longitudinal occupancy of the street, avenue, or alley, exceed three hundred (300) feet in length."

Section 3283a. "If it be necessary, in the judgment of the board of directors of any domestic or foreign corporation owning or operating a railroad wholly or partly within the state of Ohio, to use and occupy for an elevated track any portion of any public ground lying within the limits of any municipality and dedicated to the public for use as a public ground, common, landing or wharf, or for any other public purpose, excepting all streets, avenues, alley, or public road, such company may appropriate an easement over so much of such ground as may be necessary for such purpose, including the right to maintain the necessary piers and supports for said elevated track; but such

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appropriation shall be limited to such an easement as is necessary for the construction, maintenance and uses of such elevated track, in accordance with the plans hereinafter provided for. Proceedings for such appropriation shall be conducted in the manner provided in Title II, Chapter 8, part 3, of the Revised Statutes, so far as the same may be applicable thereto, but before any appropriation may be made hereunder there must be submitted to the council of the municipality general plans of the proposed structure showing the manner, character and location of all supports, any part of which will be upon such public ground, common, landing or wharf, and showing the vertical and longitudinal clearances between the supports; and no right to appropriate shall accrue to the railroad company until after said company and the council shall have agreed upon the manner, terms and conditions upon which the property may be used or occupied and the plans submitted shall have been approved by ordinance duly passed by a two-thirds vote of council, but that such appropriation shall not be restrictive of the control by the public officers or authorities over such public ground, common, landing or wharf, subject to the continued maintenance and use of such elevated track upon the terms and conditions agreed upon, and such ordinance shall be read on three separate days and the rules requiring such reading shall not be suspended."

By enacting these two sections of the statutes, the Legislature has recognized two distinct classes of public property and has provided for their appropriation by railroad companies under the law of eminent domain. So far as this case is concerned, we have only to do with streets under Section 3283, and public landings, wharves, etc., under Section 3283a. The city council may grant to railroad companies the right to cross its streets as provided in Section 3283.

Section 3283a, Revised Statutes, limits the appropriation of property under it to public landings, wharves, etc. The Legislature has vested in railroad companies as therein provided, the right to cross such public grounds. Such power is inherent in the state, and if there could be a doubt as to its right to delegate that power to railroad companies, that doubt has been judicially determined by the Supreme Court of the state in the following language:

"Sections 3283 and 3283a are not unconstitutional in that they (as claimed by plaintiffs) enlarge the scope of the right of emi-

ment domain as to this public landing beyond that existing in the year 1789 when the public landing was dedicated." *Cincinnati v. L. & N. R. R. Co.*, 9 N.P.(N.S.), 433.

This case was affirmed by the Supreme Court of Ohio, so the constitutionality of the act is not for consideration by this court.

Considerable confusion has arisen, and in fact it seems that this litigation is based on a misconception of the finding of the Supreme Court in the case of *The Louisville & Nashville Railroad v. City of Cincinnati*, *supra*. There can be no question but that the court in determining that case gave to the language used its plain, ordinary meaning and that the court intended what it said and nothing more. Counsel for the railroad company in giving their views of the decision in question, have this to say:

"As to the interest of the municipality in the property, the Supreme Court has decided in 76 O. S., 481, that the municipality was without power to alienate." Brief of Kinkead & Rogers, page 31.

The court below was evidently misled by this argument of counsel, as was the city council, else the court below would not have decided as it did and council could not have passed the ordinance now under consideration.

A careful review of that case fails to disclose any such determination by the Supreme Court of Ohio, as is contended by counsel for the railroad company. What the court did determine was that the public landing of the city of Cincinnati was not public grounds within the provisions of Section 3283, Revised Statutes; that said landing had been dedicated to a public use and that it could not be diverted from that use and subjected to another public use except under and in accordance with the law of eminent domain, and as the state had not extended to railroad companies the right to appropriate the class of public property in question the act of the railroad company and the city council was void. The court in that case was not passing on the power of the city of Cincinnati under Section 3283a. It does not follow that because the city council had no authority to act under Section 3283 that it has no power to act under Sec-

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tion 3283a. The section last named was enacted by the Legislature after the decision of the Supreme Court in 76 O. S.

Before proceeding to a consideration of the sections of the statutes in question, it should be recalled that the record in this case shows that the legal title to the property, the public landing, is in the city of Cincinnati; that it holds the same in trust for the citizens of the city, and that in case the property is not used for the purposes for which it was dedicated, it reverts to the heirs of the donor. The facts here stated give the city control over the property in question and made necessary some provision in the law for bringing into court, and binding, the unknown heirs of the donor of the property to the city of Cincinnati.

There are two provisions of Section 3283a in controversy in this case. The first is the language following:

“Proceedings for such appropriation shall be conducted in the manner provided in Title II, Chapter 8, part 3, of the Revised Statutes, so far as the same may be applicable thereto.”

This section then by reference and adoption, re-enacts so much of Title II, Chapter 8, part 3, Revised Statutes, as may be applicable to the appropriation of this property. Sections 6415 and 6420, Revised Statutes, are a part of and within the chapter to which reference is made. They read as follows:

Section 6415. “Appropriations can only be made when the corporation is unable to agree with the owner, or his guardian or trustee, as to the compensation to be paid for the property, or easement or interest therein, sought to be appropriated, or when the owner is incapable of contracting in person or by agent, and has no guardian or trustee, or is unknown, or his residence is beyond the state, or unknown.”

Section 6420. “On the day named in any summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon these questions the burden of proof shall be upon the corporation, and any interested person shall be heard.”

The record in this case further discloses that the railroad company did in part proceed under both of the above named sec-

tions of the statutes. Its action was filed in the probate court. It served the unknown heirs of the donor of the property in question by publication as therein provided. It then proceeded under Section 6420 and offered evidence to the satisfaction of the court below that it was an existing corporation and had a right to make the appropriation.

Was it the intention of the Legislature to adopt only parts of the sections referred to? It is the law that where one statute adopts the particular provisions of another by a specific descriptive reference to the statute or provision adopted, the effect is the same as though the statute or the provisions adopted had been incorporated bodily into the adopted statute. One part of a statute can not be allowed to defeat another, if by any reasonable construction the two can be made to stand together. *South-erland Statutory Construction*, Section 405.

Therefore, Section 3283a stands as though Sections 6415 and 6420, Revised Statutes, had been rewritten therein, and it is the duty of the court to so construe these sections of the statutes, if it can be done, as to give each its full force and effect.

The word here to be construed is "proceeding, or procedure." Does this word limit the operation of Sections 6415 and 6420, Revised Statutes, so that but part thereof are applicable to this act.

"The word procedure both in its popular use and technical application has a definite meaning which we can not alter or enlarge. It means in all cases, the performance of the act as wholly distinct from any consideration of the abstract right. A procedure in a civil action is an act necessary to be done in order to obtain a given end. It is a prescribed mode of action to carry into effect a legal right, and so far from involving any consideration or determination of the right, presupposes its existence. The procedure follows the right." *Ex parte McGee*, 33 Ore., 164.

The legal right, the right to appropriate this class of property, is expressly granted by Section 3283a. The procedure provided by Section 6420, Revised Statutes, is necessary to give effect to the legal right prescribed by the granting statute.

Section 3283a is a grant of additional power to railroad companies. It confers a legal right that did not exist prior to its enactment. This section not only confers the legal right to ap-

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propriate this class of property, but it specifically provides what procedure is necessary in case it is appropriated. That is, it specifies the forum, limiting the jurisdiction to the probate court, provides a method of bringing necessary parties into court, and makes a determination of certain questions, conditions precedent to the company's right to make the appropriation. In other words, the exercise of the right is predicated upon a compliance at least with some of the provisions of Section 6420. Does it mean all or only a part of same?

But that is not all. Section 3283a further provides that before an appropriation may be made, there must be submitted to council of the municipality plans of the proposed structure, showing the manner, character and location of the supports, etc.; and no right to appropriate shall *accrue* until after said company and the council shall have agreed upon the manner, terms and conditions, etc.

If the rule for construing statutes is that one part of the statutes can not be allowed to defeat another, if by any reasonable construction the two may be made to stand together, the conclusion is that Section 3283a, Revised Statutes, imposes upon railroad companies seeking to appropriate this class of public property, additional burdens to those provided in Section 6420. It must comply with all the provisions of Section 6420, and it must comply with the provisions of the statute granting the right to make the appropriation. This must be the true construction of the statute in question, in view of the fact that the property sought to be appropriated is already devoted to a public use. It does not seem reasonable that the Legislature intended to require of the ex-appropriator in this class of property, fewer restrictions than it did in appropriating private property and other classes of public property.

The question of the validity of the ordinance of the city council was argued at length on both sides, and if any confusion has arisen in the case, it is due to the language of Section 3283a. It is:

"But before any appropriation may be made hereunder there must be submitted to the council of the municipality general plans of the proposed construction showing the manner, character and location of all supports, any part of which will be upon

such public grounds, landing, or wharf and showing the vertical and longitudinal clearance between the supports; and no right to appropriate shall accrue to the railroad company until after said company and the council shall have agreed upon the manner, terms and conditions," etc.

This language follows the words adopting and incorporating the sections of the statute above referred to. It is part of the same sentence. The words are connected to the main part of the sentence by the conjunction "but." That word connects phrases and clauses of unequal rank. All that follows is subordinate to and dependent upon the principal part of the sentence.

This subordinate clause contains two provisions of equal rank. Both the punctuation and the words used, clearly indicate this to be the intention of the Legislature. The filing of the plans and their approval by council showing the proposed structure is one requirement imposed by the Legislature, and an agreement by council and the railroad company upon manner, terms and conditions upon which the property shall be used and occupied is another. The language in connection with the words manner, terms and conditions is, "no right to appropriate shall accrue," etc.

Webster defines the word accrue, *as to come to by way of increase; to arise or spring as a growth or result*. Accrue as here used means that in addition to other requirements no right to appropriate shall be derived from any or all of the other provisions of the law until after the manner, terms and conditions upon which the property shall be used and occupied shall have been agreed upon, etc.

It is the law that when a discretion is vested in any officer, board or body, and that officer, board or body exercises the discretion so vested, that that act is final and a court can not substitute its judgment for the judgment of the body in which the power is so vested, as in this case in the council, for the discretion of the council. But the council must act and come to an agreement with the company as to the manner, terms and conditions of its proposed occupancy before the company acquire or be possessed of the right to appropriate. In the case at bar, the ordinance has to do with that part of the statute relating to the structure and does not provide for any terms and conditions upon which the

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company may occupy as the statute requires, before the company can appropriate the property, therefore council has not exercised the discretion vested in it.

“Manner in contemplation of the statute, means method or mode, the way the tracks are laid. Terms, the boundary, limit, the extent of the grant. Conditions means stipulations, precedent, inducement to the grant.” *C., C., C. & St L. R. R. v. City of Cincinnati*, 6 Pro. Rep., 278.

If the case cited correctly defines the words used in this statute, the ordinance is void, as there is no mention of any terms in connection with, or limit to the grant, neither does it provide any condition precedent, limitation or stipulations in connection with the grant.

The language of the statute is very broad. It vests in council a discretion, and at the same time makes it mandatory on council, as a condition precedent to its authority to do certain things, i. e., there must be an agreement between council and the railroad company.

The law contemplates that the city and its citizens have a valuable interest in the public landing. The city holds the title to the property, and Section 3283a, Revised Statutes, authorizes a transfer of that title, the kind and amount of consideration that will compensate the city for the use of the land by the railroad company is left exclusively to the council. Council may demand a gross sum of money, or an annual rental or both. It may also require that, on the happening of any contingency named in the contract, the railroad company raise, lower, shift or entirely remove its tracks from the public landing. The city may make any demand as a condition or consideration of the grant. The railroad company is under no obligation to agree to the city's demands. The only penalty imposed on a failure to agree is that the railroad company can neither occupy nor condemn under the law of eminent domain, the right to use the property until after it shall have agreed with the city on such terms and conditions as the city may impose.

It is also claimed that the ordinance is invalid in that it contains two distinct subjects of legislation. Referring again to the record, it is not disputed that the eastern boundary of the

public landing is sixty-seven feet west of the eastern boundary of Broadway. Broadway therefore extends to the river and that part of said street south of Water street is sixty-seven feet wide.

Any right this railroad has to cross Broadway is given it by Section 3283, Revised Statutes, while its right to cross the public landing is conferred by Section 3283a. Council has only such power to legislate as is conferred on it by the legislative branch of the state. It has provided that:

“No by-law or ordinance shall contain more than one subject, which shall be clearly expressed in the title.” Section 1694, Revised Statutes.

The subjects concerning which council has undertaken to legislate, in the ordinance in question, are the streets and the public landing of the city; *they* and not the railroad are controlled by the ordinance. Therefore, as the ordinance contains provisions relating to property other than the public landing, it contains more than one subject of legislation, and is void.

If the views here expressed correctly state the law, it follows that the judgment of the court below must be affirmed.

There is, however, one matter that was not argued by, but to which counsel's attention is directed. It was conceded at the trial of this case that property already devoted to a public use can not be taken for, nor subjected to, another public use, unless the latter is a superior or a more important public use and does not destroy or cripple or seriously interfere with the former use. The language of the text-writers on the subject is:

“The proposed taking shall not destroy, or cripple, or seriously interfere with the prior public use.”

The record in this case discloses that the railroad seeks to use the easement over this property to reach, and as a part of, its terminal for yard and freight depot purposes. The public landing is the only terminal that the city has or can have in connection with the river. So both uses of the land in question may be said to be for terminal purposes. The question then is, does the rule of law applicable to navigable streams and railroads apply to terminals for such navigable streams and railroads.

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The Supreme Court of Ohio has determined the question as between navigable streams and railroads. The controversy in the case referred to was between the Miami & Erie canal and a railroad. The court says:

"They show further, that as between two public uses, that for purposes of navigation is paramount over public uses for railroads, even as against the right to cross." *State, ex rel, etc., v. Ry. Co.*, 37 O. S., 173.

The question of terminals is becoming most important both to transportation companies and towns and cities. Without adequate terminal facilities, means of transportation do not have the same importance as with them.

The Supreme Court of the United States, of Ohio and other states, has passed on the question of wharves.

"A wharf is a necessary incident to transportation." *Iron-ton R. E. v. City of Ironton*, 19 O. S., 299, 305.

"Navigable streams would be of little value without wharves, if they had no place where the vessels which they floated could land. Wharves and piers are as necessary almost to the successful use of the stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentality of this branch of commerce." *Atlee v. Packet Co.*, 21 Wall., 389-393.

"Wharves, levies and landing places are essential to commerce by water no less than a navigable channel and a clear river." *Parkersburg Transit Co. v. Parkersburg*, 107 U. S., 701; *Ferry Company v. Penn.*, 114 U. S., 205.

"It has been generally recognized by the courts that wharves are almost as essential to commerce as the water-ways themselves." *Cobb v. Lincoln Park*, 202 Ill., 434.

If the law as declared by the courts in controversies between navigable streams and railroads is applied to their terminals, the railroad company would not be able to show that the use it seeks to make of the public landing in Cincinnati was superior to the use to which the public landing was dedicated. That question is not here determined.

MECHANICS' LIENS.

Common Pleas Court of Montgomery County.

EDWARD HERBST V. W. J. CONNERS ET AL.

Decided, May 31, 1911.

Pleading—In a Proceeding to Foreclose a Mechanic's Lien—Filing of One Lien Not Sufficient, When—Construction of Section 8308.

1. Where more than one building has been erected on different lots, it is not sufficient that but one mechanic's lien be filed for all the buildings, unless the lots upon which the buildings stand are contiguous.
2. In an action to foreclose a mechanic's lien, the petition should be definite as to whether the work was performed under a general contract and also as to whether or not the lots upon which the building or buildings stand are contiguous.

James Knight and Flatau & Lindsey, for plaintiff.

Thomas & Bronson, for the Equitable Savings & Loan Association.

MARTIN, J.

In this case there has been a demurrer filed to the second cause of action. The second cause of action in this case sets forth facts showing that a mechanic's lien has been filed on certain lots, and on these facts set forth in said second cause of action plaintiff asks for foreclosure of said lien. This demurrer is based upon the ground that where there is more than one building erected on lots which are not contiguous a mechanic's lien should be filed for each and every building upon the lots upon which such buildings are erected. Section 8308 of the General Code of Ohio provides for the filing of a lien upon any building and the land upon which said building may stand for the work or labor of erecting, altering, repairing, or moving said building. In other words, the lien shall extend to no other land except the land upon which the house or structure stands which is erected. Section 8311 provides that when the improvement consists of

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two or more buildings united together upon the same lot or contiguous lots, or of several buildings upon contiguous lots, but erected under one general contract, it shall not be necessary to file a separate lien upon each building for the work done. This section was evidently passed for the purpose of modifying the former section, which provided that the lien could only be placed upon the land upon which the building was erected and no other land. So that the law is very clear that when more than one building is erected upon different lots, those lots must be contiguous if but one lien is to be filed for all the buildings.

In the second cause of action it appears that there were a number of houses and buildings erected for the defendant, Connors. It also appears in the same cause of action that the numbers given to the lots are not consecutive. In other words, judging by the customary way in which lots are numbered there must have been nine lots between lot number 34 and lot number 44. But the fact that they are attempting to foreclose the lien on these lots, and that they aver that the contract was for more than one building, and that the lots are not consecutively numbered does not necessarily mean that they are seeking to foreclose on more than one building or that the lots are not contiguous, but it does create an inference amounting almost to such a presumption, and although the court does not feel that it would be justified in sustaining this demurrer as a demurrer, it feels it should sustain the same as a motion to make said second cause of action more definite and certain so as to bring it more clearly under the modification set forth in Section 8311 of the General Code as to being a general contract and as to whether or not the lots are contiguous.

The demurrer will be sustained as a motion to make more definite and certain.

INJURIES FROM THE BITE OF A DOG.

Common Pleas Court of Hamilton County.

CLIFFORD D. BUFFON, A MINOR, v. LEOPOLD KLEYBOLTE.

Decided, May, 1910.

Pleading—Injuries from the Bite of a Dog—Necessary Allegations in an Action for Damages—Section 4212-2, Revised Statutes.

In an action for damages on account of a dog bite, it is not necessary to allege that the dog was known to the owner to be vicious or that he was in fact vicious.

J. A. Rudel and L. H. Pummill, for plaintiff.

Kramer & Bettman, contra.

DICKSON, J.

This is an action for damages by reason of the plaintiff having been bitten by a dog and injured, for which injuries he claims \$541.

Defendant demurs to the petition for the reason that it does not state facts sufficient to constitute a cause of action, claiming thereby that under the common law, plaintiff should have stated in his petition that the dog was a vicious dog and that this viciousness was known to the owner.

Section 4212-2, Section 2, provides:

“Any animal of the dog kind * * * that injuries * * *
* any person, may be killed by any person at any time at any
place, and the owner or owners or harborers * * * of any
animal of the dog kind that injuries * * * any person,
shall be jointly and severally liable to any person so damaged
to the full amount of the injury done.” * * *

Where the common law and the statute conflict the statute governs. There is no requirement under the statutes of Ohio that the dog should have been vicious, or that this viciousness should have been known to the owner.

Demurrer overruled.

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Plow Co. v. Railway.

**AS TO DAMAGES TO PROPERTY FROM THE BLOCKING
OF A STREET.**

Common Pleas Court of Franklin County.

**THE COLUMBUS PLOW COMPANY v. THE P., C., C. & ST. L.
RAILWAY CO.**

Decided, October, 1911.

*Abutting Owner—Not Entitled to Damages from Blocking of Street,
When—Elimination of Grade Crossing by Vacating Portion of
Street and Blocking it with a Fill.*

Where in the elimination of a grade crossing a part of a street is vacated and blocked with a fill, an action for damages by an abutting owner on that part of the street not vacated does not lie on a complaint of less convenient means of ingress and egress, where the same inconvenience is suffered, though perhaps in less degree, by the general public.

*T. J. Keating and W. H. Jones, for plaintiff.
Henderson, Livesay & Burr, contra.*

RATHMELL, J.

This cause is submitted upon an agreed statement of facts, and elaborate briefs have been filed by counsel.

The action is one for damages alleged to have been caused by defendant's interfering with the reasonable access to plaintiff's premises by reason of constructing a dirt fill across Davis and Cable avenues within the right-of-way of the defendant railway, which portion of said streets had been theretofore vacated by the city of Columbus to effect a plan to eliminate grade crossings of defendant's road in that vicinity. It appears from the agreed statement that the vacation of the portions of Davis and Cable avenues, and the filling of the vacated portions within defendant's right-of-way were parts of the same plan to eliminate grade crossings.

The plaintiff's property lies at the southeast corner of Davis and River streets, abutting on the east side of Davis avenue

132.47 feet, and 115.85 feet on River street, which runs along the north side of said premises. River and Cable streets run east and west, and Davis, Darby and Sandusky streets run north and south, and run into Broad street, a main thoroughfare. Said plan of elimination did not provide for any crossing of Davis or Cable avenues over or under said railway tracks, but did provide for a subway under said tracks at Darby street, the east line of which is situated 115 feet west of the west line of Davis avenue, and parallel to said Davis avenue, and for a subway under said tracks at Sandusky street, the west line of which is 511.5 feet east of the east line of Davis avenue, and parallel to same.

The complaint of the plaintiff is that the easements and right-of-way over said Davis and Cable avenues were a valuable asset and appurtenance to its real estate and plant (which is that of manufacturing plows and agricultural machinery), and that by defendant's erecting the dirt fill across said avenues, it has obstructed and destroyed the ingress and egress of plaintiff to and across said avenues; that said avenues have been in use by the citizens of the vicinity and by travelers at large for a great number of years as a means of ingress and egress to and from plaintiff's said premises and the vicinity thereof; that said streets and plaintiff's buildings have been improved with reference to the location of said streets, the grade thereof, the easements in, the right-of-way over and access to and from the same, and that by reason of said obstructions of Davis and Cable avenues all reasonable access to and from plaintiff's premises and business will be cut off. In short the gist of the complaint is that by constructing the fill in the vacated portions of Davis and Cable avenues, the defendant has destroyed the ingress and egress of plaintiff to and across said avenues, leaving no reasonable access to its premises as claimed.

The validity of the vacation of parts of Davis and Cable avenues within the right-of-way of the defendant railway, either impliedly by Revised Statutes, 3337-17a or by the express provisions of 2652 and 2653, Revised Statutes (General Code, 3725,

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26, 27 and 28, and 8874) we deem established beyond question.

It is urged that case No. 56872 made a part of the agreed statement is a bar to this proceeding. Case No. 56872 was an action to enjoin the erection of the dirt fill across Davis and Cable avenues within the right-of-way of the defendant railway. This action is to recover consequential damages for closing and interrupting access by way of said avenues. We think the question of consequential damages was not necessarily involved in the injunction suit, and that the two suits are not therefore identical, nor substantially so.

The gist of the complaint lies in destroying access to the premises by means of Davis avenue from the south. The primary cause of this was vacating the portions of Davis and Cable avenues as part of the plan for eliminating grade crossings. The vacation and the fill were parts of the same plan. It is because the fill bars passage on the street in that direction that complaint is made, and not that the fill effects special injury otherwise. The fill is not an element to be considered otherwise than as blocking the passage of Davis and Cable avenues. So that in effect we have one of that class of cases involving the right of an adjoining owner to damage where a portion of a street is vacated other than that on which he abuts.

The question I apprehend is whether the plaintiff, a property owner on Davis street, has been specially and peculiarly damaged, where a portion of the street other than the part on which its property abuts has been vacated by the city and a fill erected on the vacated portion, destroying access to its property by means of such street, in view of the two provided ways, one 115 feet west and the other 511.5 feet east leading in the direction of the street a portion of which was closed.

The question of whether there is special and peculiar damage for the mere closing of a portion of a street, to the property of an abutter on the same street on a part of the street not closed, has resulted in a difference of opinion by the courts in different jurisdictions. The matter will be found discussed in *Dillon's Municipal Corporations*, 5th Ed., Volume 3, Section 1160; in

Elliott's Roads and Streets, 2d Volume, Section 1180, 3d Edition; two notes, 2 L. R. A. (N. S.), 269, and 30 L. R. A. (N. S.), 637. The Ohio cases have been ably discussed by counsel in their briefs.

"The question whether an abutting owner is entitled to receive compensation for property by the vacating of a city street in its nature depends, it has frequently been held, upon the ability of the claimant to establish that he is specially and peculiarly damaged thereby, i. e., that he suffers an injury differing in nature and not merely in degree from that suffered by the public at large. * * * Many decisions declare that as a general rule, only property abutting upon the portion of the street closed is specially damaged by the vacation, and that only such abutter can recover damages or compensation for the taking of his property. Hence if the property of the abutter is located on another street or on a different part of the same street, he is not entitled to compensation or damages." Section 1160, *Dillon on Munic. Cor.*, Volume 3, 5th Ed.

Some exceptions are noted to this rule, some courts holding that the right which an abutter has in a highway as a means of enjoying the free and convenient use of his abutting property is special.

The abutting lot owner, in addition to his easement in the street for passage and repassage in common with the general public, has a special easement in the street appendant and appurtenant to his lot for ingress and egress—the easement of access. 67 O. S., 190; 66 O. S., 116; *Elliott's Roads and Streets*, Sections 876, 883, 2d Ed.

It would seem from the case of *Kinnear Mfg. Co. v. Beatty*, 65 O. S., 264, that the general rule above noted is the one prevailing in this state. That to entitle a property owner on a street where a portion of the same other than the part on which he abuts has been vacated and where he has reasonable access to his property by other streets, although the distance he may have to travel in some directions may be greater than before the vacation, to any relief, the inconvenience he suffers must differ in kind from that of the general public, and not only in degree.

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But it is contended that as to the right of an adjoining owner, the rule of damage in such case has been altered by the more recent case of *Schimmelmänn v. The Lake Shore & Mich. So. Ry. Co.*, 83 O. S., 356.

While the court distinguished the Beatty case from the Schimmelmänn case in some particulars, it does not appear the general rule for damage in such cases was abrogated.

We think it appears from the opinion in the Schimmelmänn case that the court treated it as involving the doctrine of the change of grade cases. The court discusses a number of change of grade cases.

The court in the opinion say:

"Did the plaintiffs sustain direct consequential injury to their real estate as improved to the *former grade* by the acts of the defendants? * * *

"It seems that defendants rely largely on the fact that they did not depress Dille street immediately in front of plaintiff's premises. * * *

"The acts as we have recited them make an obstruction—a *change of grade*—a vacation differing only in degree from a change of grade in the entire street."

And in distinguishing the Beatty case in one particular it is stated: "Moreover there was no *change of grades* or excavation to inflict any inconvenience or injury."

In the case at bar there is no change of grade in Davis street affecting the access to plaintiff's premises in that portion of said street on which said premises abut.

It is true the vacation and fill affect the passage of plaintiff across Davis and Cable avenues towards Broad street, but this is in common with the general public and not a subject of damage.

The slightly less convenient ways provided, is an inconvenience differing in degree from that of the general public and not in kind; and is such as the doctrine of the general rule above noted denies to owners of property resulting from the vacation of a portion of a street not in front of his premises. 65 O. S., 264, 283; 11 O. S., 163; 19 C. C., 308.

Elliott on Roads and Streets, Section 1180, citing the New York holding that the Legislature may authorize the vacation and closing of one public way to the adjoining property owner, provided another way is left open, adds *Kinner Mfg. Co. v. Beatty* as in line with that doctrine.

In view of the foregoing we think that under the issues and facts presented in this case it can not be said that the ways provided for claimant by other streets do not afford reasonable access to its property, or that it has been specially and peculiarly damaged by the elimination of the grade crossing at Davis and Cable avenues under the rule in such cases in this state, and the finding is therefore in favor of defendant with judgment accordingly.

TRANSFERS OF CORPORATE STOCK.

Common Pleas Court of Hamilton County.

WALLACE BURCH V. THE CINCINNATI TRUST COMPANY AND THE CINCINNATI GAS & ELECTRIC COMPANY.*

Decided, October, 1911.

Corporations—Authority of an Executor to Transfer Stock—Order to Sell at the Market Price within the Requirement of the Statute—Proper Procedure to Compel a Transfer—Certified Copy of Order of Court Can Not be Demanded—Limitations on the Function of Transfer Agents—Sections 10704 and 8673.

1. An order by the probate court directing the sale of corporate stock belonging to the estate of a decedent at the market price is an order to sell for not less than the market price on the day the sale is made, and is a sufficient compliance with the statutory requirement that the court must order the stock sold at not less than the price fixed by the order.
2. Such an order is sufficient to protect the corporation issuing the stock against any claim which might be made on account of a wrongful transfer; and it is not necessary for the protection of

* Affirmed by the Circuit Court, *Burch v. Trust Co.*, 14 C.C.(N.S.), 346.

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- the corporation that the representative of the estate in presenting the stock for transfer accompany it with a certified copy of the order of court authorizing the transfer.
3. It is a matter of grave doubt whether the appointment by a corporation of a transfer agent of its stock is in compliance with the statutory requirement that the "secretary" of the corporation "register all subscriptions and transfers of stock."
 4. The proper procedure for compelling a transfer of stock is by petition asking for a mandatory injunction; and in such a case it is not necessary that the transfer agent be made a party.

Wallace Burch and Robert Burch, for plaintiff.

Louis A. Ireton, contra.

GERMAN, J.

The petition in this case is for a mandatory injunction to require the Cincinnati Trust Company, the transfer agent of the Cincinnati Gas & Electric Company, and the Cincinnati Gas & Electric Company to transfer on the books of the Cincinnati Gas & Electric Company five shares of stock claimed to be held and owned by the plaintiff, Wallace Burch.

The five shares of stock were the property of Henry Buehren, deceased, who died in Hamilton county, Ohio, and an executrix of the estate, Bertha Buehren, was appointed by the probate court of this county to administer his estate. On the 14th of October, 1911, said executrix filed an application in the probate court and an order was made thereon authorizing and directing her to sell said five shares of stock in the Cincinnati Gas & Electric Company. This order was made under Section 10704 of the General Code, which provides that:

"The executor or administrator may sell either at public or private sale stock or shares in a corporation, but if he sells at private sale it must be for a sum not less than for that purpose is fixed by an order of the probate court."

The order of the probate court directing the sale of said stock was as follows:

"This cause coming on this day to be heard upon the application of the executrix herein for authority to dispose of five

shares of the Cincinnati Gas & Electric Company stock, and it appearing to the court that it is necessary to sell the said stock to comply with the terms and conditions of the will, and also to pay the debts of said estate, said Bertha Buehren, executrix, is hereby authorized and empowered to dispose of said stock at its market value, for cash."

On the 16th day of October, 1911, the plaintiff bought said certificate at its market value of \$86.50 per share.

The petition further avers that the Cincinnati Trust Company has been designated as the transfer agent of the Cincinnati Gas & Electric Company and is empowered to transfer said stock upon the books of the Cincinnati Gas & Electric Company; that upon receiving said certificate for said five shares of stock from said executrix duly indorsed by her, the plaintiff presented the same to the Cincinnati Trust Company as the transfer agent of the Cincinnati Gas & Electric Company and requested the transfer of said stock to him, which transfer the defendant, the Cincinnati Trust Company, refused to make. A demurrer was interposed to this petition and the matter was argued to the court.

Section 8673, General Code, among other things, provides that:

"The directors of a corporation * * * shall keep a record of all stock subscribed and transferred, and its secretary or recording officer shall register all subscriptions and transfers of stock. For that purpose a book shall be kept, and when a certificate of stock is assigned and delivered by a stockholder, the assignee thereof on demand may have it duly transferred therein by such officer, who at the same time shall enroll also the name of the assignee as a stockholder." * * *

There is no other statutory provision relating to the assignment and transfer of stock, except the amendments to Section 8673, which were passed by the Legislature in 1911, and are found in the 102 Ohio Laws, page 505, etc. These amendments are numbered Sections 8673-1 to 8673-22 inclusive. By the provision of Section 1 of this amendment, the transfer and delivery of a certificate of stock in any corporation may be made by indorsing upon the certificate the name of the owner either in favor of a specific person or in blank, or by delivering the certificate

of stock without an indorsement but accompanied by a separate document in writing containing an assignment of the certificate or a power of attorney to sell, assign or transfer the same, which assignment or power of attorney may be either in blank or to a specified person. In substance, the certificate may be assigned by the owner of the certificate (which would include also the executor or administrator of a deceased person) signing the same either in blank or to a specific person; or it may be delivered without the signature of the owner if it is accompanied by a written assignment or transfer.

Now this section further provides that this method of transfer and assignment shall be applicable, although the charter, or articles of incorporation, or code of regulations, or by-laws of the corporation issuing the certificate provide that the shares represented thereby shall be transferred by a transfer agent.

It was contended in the argument of this case that the order of the probate court was not in compliance with Section 10704 of the General Code, and that therefore the Cincinnati Trust Company, claiming to be the transfer agent, was warranted and authorized in refusing to transfer the stock to the plaintiff. The transfer agent had presented to it a certified copy under the seal of the probate court of the order of the probate court above set out and the certificate of stock duly assigned by the executrix in favor of the plaintiff. The claim is made that the order of the probate court should have provided that the stock should not be sold for less than a specified price, and that because it did not so provide, the transfer agent was justified in refusing to make the transfer.

As the court reads Section 10704 of the General Code the order of the probate court was strictly in compliance therewith. The section provides that if the stock is sold at private sale it must be for a sum not less than that fixed by an order of the probate court. Now the probate court directed the stock to be sold at the market price. It was not necessary that the order should have recited that the stock should be sold for not less than the market price. The law prohibited the executrix from

selling at a price less than that fixed by the probate court, to-wit, the market price. It was the duty of the probate court to fix the price at which the stock should be sold, and under the law it was not permissible for the executrix to sell at a less price. But because the executrix under the statute could not sell for a sum less than that fixed by the probate court, it does not follow that the probate court should have stated that fact, that the executrix should not sell for less than the price fixed. The statute contemplates that the probate court shall fix the price at which the stock shall be sold, and it further contemplates that the executrix or administrator shall not sell for a less price. Now the probate court did fix the price at which this stock could be sold as of the market price.

Now the market price would vary from day to day, and it seems to the court that the only rational order which the probate court could make in cases of this kind where stock has a market value, and the market value may be fluctuating from day to day, is to fix a sale price at the market price, and then whenever it is sold it is to be sold at the market price.

However this may be, it appears to the court that the order of the probate court directing the sale and the presentation of the certificate duly signed is sufficient to protect the Cincinnati Gas & Electric Company or its transfer agent against any claim that may be made by any person interested in the stock. It is not the province of the gas company or its transfer agent to question the power or authority of the probate court to make the order to sell the stock. The transfer agent of a corporation is only bound to see that the order was made directing the sale, and the probate court of this county, being a court of record, speaks through its record and all persons are bound to take notice of its order and decrees. It is not necessary for the holders of stock to procure a certified copy of the decree or order of the probate court, because every person who resides within the jurisdiction of the court is bound to take notice of the decrees and orders of the court, and the furnishing of a certified copy of the order of the probate court at the expense of the estate, seems to the court to be an unreasonable requirement by the

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corporation whose stock is to be transferred. If there is any question about the order having been made, the corporation whose stock is involved, or its agents, have access to the court's records to determine whether or not the order was made.

Furthermore, in this case, it is a grave question whether or not the Cincinnati Gas & Electric Company has the power to designate another corporation as its transfer agent. The statute, Section 8673, General Code, provides that the secretary or recording officer of the company shall register and transfer all stock on demand or may have it duly transferred by such officer. Such officer means either the secretary or the recording officer of the company whose stock is concerned. Now, the Cincinnati Trust Company can be neither the secretary nor the recording officer of the Cincinnati Gas & Electric Company. That officer must be some individual who is a stockholder of the company, and in the opinion of the court, the proper person to whom the certificate should have been presented for transfer is the secretary or recording officer of the Cincinnati Gas & Electric Company, and it was not necessary for the plaintiff in this case to present his certificate to another corporation claiming to be acting as the transfer agent of the Cincinnati Gas & Electric Company. If the Cincinnati Gas & Electric Company desires the Cincinnati Trust Company to act as its agent in securing information with reference to the transfer of its stock for its convenience and accommodation, it may do so, but it has no right to impose an onerous burden upon the holders of its stock by requiring them to procure a certified copy of a court of record and to present their certificate and the evidence to another corporation to determine whether or not the stock shall be transferred to the rightful owner.

If it be doubted that the probate court is a court of record and that its records import absolute verity, the court desires to cite counsel to *Shroyer v. Richmond et al*, 16 O. S., 455, and *Railroad Co. v. Belle Centre*, 48 O. S., 273.

That this proceeding is the proper one for the holder of a certificate to take, to-wit: a petition asking for a mandatory injunction, the court would refer counsel to the following authorities

as sustaining the contention of the plaintiff: *Krohn v. Bridge Co.*, 4 N. P., 270; *Arbuckle v. Spice*, 21 C. C., 356; *Olliver v. C. & W. T. P. Co.*, *Hosea's Rep.*, 457; *Snodgrass v. Morrison*, 4th Ohio Law Rep., 622.

In the opinion of the court, therefore, neither the Cincinnati Trust Company nor the Cincinnati Gas & Electric Company were warranted in refusing to transfer this stock to the plaintiff under the facts set out in the petition, and especially was not the Cincinnati Gas & Electric Company warranted in refusing to make the transfer. In the opinion of the court, the Cincinnati Trust Company need not have been made a party to this proceeding, even though it be designated as the transfer agent of the Cincinnati Gas & Electric Company, in view of the provisions of Section 8673, General Code.

The demurrer to the petition will therefore be overruled, and the defendants not desiring to plead further, the judgment of the court is that a mandatory injunction issue to the Cincinnati Gas & Electric Company and to the Cincinnati Trust Company directing them and each of them to transfer said stock on the books of the Cincinnati Gas & Electric Company to the plaintiff. The costs will be adjudged against the defendants.

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Railway v. Tax Commission.

ABSOLUTE POWERS OF THE OHIO TAX COMMISSION.

Common Pleas Court of Franklin County.

THE OHIO RIVER & WESTERN RAILWAY COMPANY v. R. M.
DITTY, F. F. MUNN AND C. H. R. PARST, AS THE TAX
COMMISSION OF OHIO, ET AL.

Decided, November 6, 1911.

Taxation—Construction of 101 O. L., 399, Relative to the Tax Commission of Ohio—Injunction Does Not Lie Against the Commission—Remedy Where Constitutional Rights are Violated by Action the Commission May Have Taken.

Injunction does not lie to restrain the Tax Commission of Ohio from certifying to the Auditor of State the gross intra-state earnings of a railway company, to be used as a basis for levying an excise tax against the said company; but in such a case the appeal against a violation of constitutional rights in the matter of taxation lies, either in an action against the Secretary of State to restrain him from canceling the articles of incorporation of the plaintiff company for refusing payment of the taxes assessed, or in an action against the State Treasurer for recovery of taxes illegally paid.

R. J. King, for plaintiff.

Timothy S. Hogan, Attorney-General, contra.

BIGGER, J. (orally).

Application is made to the court for a temporary injunction restraining the tax commission of Ohio, and the members thereof as individuals, from certifying to the Auditor of State the amount of the gross intra-state earnings of the plaintiff for the year ending on the 30th day of June, 1911, as a basis under the law for the levy of an excise tax against the plaintiff for the privilege of carrying on its intra-state business.

The court is confronted with the provisions of Section 33 of the act passed May 31, 1911, entitled "An act to repeal Sections 5446 to 5542-8, inclusive, and 5542-10 to 5542-24, inclusive, of the General Code as enacted May 10, 1910" (101 Ohio Laws, 399), relative to the tax commission of Ohio, and to further define its powers and duties.

Section 33 of the act reads:

"No injunction shall issue suspending or staying any order, determination or direction of the commission, or any action of the auditor of state, treasurer of state, or attorney-general, required by law to be taken in pursuance of any such order, determination or direction; but nothing herein shall affect any right or defense in any action to collect any tax or penalty."

Notwithstanding this plain provision of the statute, it is insisted that the court in order to enforce and protect the constitutional rights of the plaintiff has the power to issue an injunction restraining the tax commission of Ohio from certifying the gross earnings of plaintiff to the auditor. It seems to me there can be no question but that it was the legislative intent to provide that no interference with the officers named in this section by injunction shall be permitted. The language is clear and explicit. It is a well established principle of law that courts of equity are loath to interpose by injunction between the state and the collection of its revenues.

In my opinion it was the legislative intent that injunction should not issue to restrain the officers named in this section in any respect in the discharge of the duties imposed upon them by law.

The question here raised appears to be one of jurisdiction or power in this court to grant the relief here prayed for. Under the Constitution of 1802 the common pleas court was clothed with common law and chancery jurisdiction in all such cases as should be directed by law. The Constitution of 1851 simply provides that the jurisdiction of the court of common pleas and of the judges thereof shall be fixed by law.

In the case of *Stevens v. State*, 3 O. S., 453, it was decided that the Constitution confers no jurisdiction whatever upon the common pleas court in either civil or criminal cases; that it is made capable of receiving jurisdiction in all such cases, but can exercise none until conferred by law. We must look therefore to the statutes of the state for the jurisdiction of this court to grant injunctions.

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Title 4 of the General Code relates to procedure in the common pleas court. Division 6 of that title relates to provisional remedies, and Chapter 4 of that division relates to the power of the court to grant injunctions. Section 11876 contains the general grant of power, and concludes with the provision that when specially authorized by statute such order also may be granted. Chapter 7 of the same division contains a special grant of jurisdiction to the common pleas court to enjoin the illegal levy or collection of taxes and assessments, and to entertain actions to recover them back when collected.

The latest expression of the legislative intent, however, on this subject relating to injunction against the illegal levy and collection of taxes, is found in Section 33 of this act, which takes away the jurisdiction granted by Section 12075 in such cases insofar as it relates to the state tax commission and the state officers named in said section. This seems to make it clear that this court is without jurisdiction to grant the relief here asked, and shows that the plaintiff must resort to some other remedy.

If no remedy were provided by law, no procedure provided for by which the plaintiff might appeal to the courts for a determination of the questions presented by its petition, a very grave question would be here presented. It has been decided by the Supreme Court of this state that while the levy of excise taxes rests with the Legislature in the first instance, an appeal lies to the courts for the protection of the constitutional rights of those against whom such taxes are levied.

The Constitution provides that the courts shall be open, and that any person shall have a right to resort thereto for any injury done him in his person or property. These constitutional guaranties can not be taken away by the Legislature, and if no provision were made by which the plaintiff could have the questions here presented heard in a court of competent jurisdiction a very grave question would be presented.

I point out, however, that as Section 33 does not forbid such an action to be brought against the secretary of state, that the relief here sought may be as well had in an action against the secretary of state to restrain him from canceling the articles of

incorporation; and I also call attention to the provision of Section 12075 of the General Code, which clothes this court with jurisdiction to entertain actions to recover back illegal taxes that have been paid. The question has probably not been decided in Ohio as to whether this provision is applicable to the treasurer of state, but the language of the statute is broad enough in its terms, it would seem, to warrant such an action, and it has been held in other jurisdictions that such an action against the state treasurer is not an action against the state, although there is some authority to the contrary. (See 37 Cyc., p. 1187, and cases cited.)

The Supreme Court decided in *Woodbury v. Minch*, 48 O. S., 210, that where one pays an illegal assessment he can not recover it back in a suit against the treasurer, unless the payment was involuntary; that to render it an involuntary payment it must appear that the treasurer was about to levy a distress upon the property; that a simple protest was not sufficient, and that as the statute afforded a plain remedy by injunction that it was the duty of the property owner to resort to that remedy. When that remedy, however, is taken away, undoubtedly the other provision of Section 12075, which provides that this court shall have jurisdiction of an action to recover back illegal taxes that have been paid, would be applicable.

In view of the above considerations, and as a result of the brief time which I have had for consideration on this application, I am of opinion that this court is without jurisdiction to grant the relief here sought.

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Smith v. Assurance Co.

CONSTRUCTION OF A CONTRACT OF ACCIDENT INSURANCE.

Common Pleas Court of Hamilton County.

JAMES H. SMITH v. THE AMERICAN ASSURANCE COMPANY.

Decided, April, 1911.

Accident Insurance—Construction of a Condition Precedent as to Payment of Premiums—Change of Relation from Insurer and Insured to Debtor and Creditor.

1. The condition written into a policy of insurance against accident or injury, that "the actual payment of the respective premiums on the date when due or within seven days thereafter, whether the insured is entitled to indemnity at the time or not," is a condition precedent to the renewal of the policy for another term and against future injury, and not a condition precedent to the payment of indemnity by the company for injuries sustained after the payment of one premium and before the next premium fell due.
2. If the above is not the true construction of the condition, but the true meaning is that the insured shall not be entitled to be paid for injury sustained unless he continues the policy in force after the accident, then such condition is inoperative.

SWING, J.

This cause is submitted to me upon an agreed statement of facts. The plaintiff had a policy of insurance against injury by accident in the defendant company, issued March 12, 1906, by the company, agreeing to pay him should he be injured, \$8 per week. On May 17, 1906, plaintiff fell and broke his left leg and was disabled and incapacitated from performing work and transacting business for fifteen weeks. On June 12, 1906, the company paid plaintiff \$27.50, which it claims was a payment in full under the policy. The plaintiff had paid monthly dues of premiums up to the time of the accident, of \$1 each, one dollar being paid June 12, 1906, three days before the accident. The policy was in force at the time of the accident, the payment for the month of June having been made. The policy insures the person named against bodily injury caused by accident, etc., which shall, immediately following the receipt of the premium, wholly and continuously

disable and prevent the insured for one week or more, from transacting any and every kind of business, etc., at the rate of \$8 per week from the date of the first personal attendance by a registered physician, etc., during the period of attendance by such physician, not to exceed fifty-two consecutive weeks.

In this case the disability was fifteen weeks as above stated. The policy contained the following condition:

"The actual payment of the respective premiums on the date when due or within seven days thereafter, *whether the insured is entitled to indemnity at the time or not*, is a condition precedent to the renewal of this policy for another term. If not so paid this policy shall be deemed to have lapsed on the date when the premiums were due. All premiums are payable at the home office of the company without notice."

The policy also contained the following condition:

"In consideration of the warranties in the application hereof, a copy of which is annexed hereto and made a part hereof, the payment of the policy fee, and the payment on or before the date hereof and monthly thereafter of the two several premiums for the Casualty Element and Life Element respectively, does hereby insure the person named."

The plaintiff claims that he is entitled to receive from the defendant the sum of \$8 per week for the entire time during which he was disabled—fifteen weeks—making a sum of \$120, less a credit of \$27.50 paid by the company June 12, 1906. The plaintiff further claims that if there were anything due him in benefits under the policy at the time he stopped payment, after the accident, the same should be used as an off-set against the premiums due to the company.

The defendant claims that by virtue of the condition above set forth as to payment whether the insured is entitled to indemnity or not, the plaintiff is not entitled to recover anything on this policy, because it has lapsed for non-payment. The defendant further claims that assuming that the policy had not lapsed and that there was anything due the plaintiff thereon, by virtue of the above condition the company is not bound to apply anything on the premium, but on the terms of the condition, the

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plaintiff was bound to make actual payment of the premiums when due, or within seven weeks thereafter.

The decision of the case depends upon the effect of the condition above quoted, to-wit, that the actual payment of the respective premiums when due, etc., whether the insured is entitled to indemnity at the time or not, is a condition precedent to the renewal of this policy for another term; if not so paid, this policy shall be deemed to have lapsed on the date when premiums should be due.

I am called upon to determine the meaning and effect of that condition. In the case of *Burkheiser v. Mutual Accident Association of the Northwest*, U. S. C. C. of Appeals, Seventh Circuit, 61 Fed. Rep., page 816, the syllabus is as follows:

"A mutual benefit association insured its members 'against personal bodily injuries effected during the continuance of membership in this insurance through external, violent and accidental means,' and against death resulting from such injuries within ninety days after the accident. *Held*: that where a member died within ninety days after an accident that caused his death, the fact that before his death he ceased to be a member because of default in paying an assessment falling due after the accident, did not relieve the association from liability, since its liability became fixed at the time of the accident."

It is said in the opinion in that case that on the 20th day of December, 1890, the plaintiff met with an accident within the terms of the policy and died on the 23d of January, 1891. On the 15th day of December, 1890, before the accident, the company levied an indemnity assessment on its members, payable January 15, 1891, notice of which was given to the plaintiff December 15, 1890. The defendant pleaded this assessment and the failure of plaintiff to pay it, and claimed that by reason thereof and by force of the by-laws, he ceased to be a member from and after the 15th day of January, 1891, whereby the policy was wholly discharged and annulled. The by-laws was as follows:

"Any member who shall fail or neglect to remit to the association the amount of any assessment made upon him within thirty days from the date the notice thereof was sent, shall cease to be a member of the association."

At the trial the court instructed a verdict for the defendant. The reviewing court in the opinion say:

"If liability for an accidental injury came to an end when Mr. Burkheiser, by reason of default in payment of an assessment, ceased to be a member of the association, the instruction was correct; * * * if not, the instruction should have been for a verdict for the plaintiff."

It is further said:

"The policy insures against personal bodily injuries effected during the continuance of membership," etc.

It is also said that:

"The policy was clearly designed * * * to indemnify for injuries sustained during membership."

Also:

"The contract with respect to liability of the company had relation to the time of the happening of the accident, not to the time of the final outcome of the injury, or to the time when liability should be discharged by payment. The liability of the association became absolute upon the occurrence of the accident."

Then it is said:

"There was no obligation on the part of the assured to continue in membership after an injury, nor does his failure so to do result in forfeiture of indemnity for injuries theretofore received, or in discharge of liability theretofore incurred."

Then follow these words, upon which defendant in this case lays stress:

"We search the policy in vain for a suggestion that that liability should be released or discharged if, through default in payment of an assessment the assured should, after the incurring of the accidental injury, cease to be a member of the association. By failure to honor the assessment, he indeed ceased to be a member of the association and could no longer look to the company for idemnity for accidental injury thereafter occurring; but by no term of the contract and by no provision of the by-laws does such cessation of membership work a forfeiture of rights accrued, or release the company from legal liability incurred

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under the policy during continuance of membership. The membership ceases; the legal liability for previous accidental injury remains."

It is claimed by counsel for defendant that this last statement of the court in that case implies that if the policy had provided for its termination through default in payment of an assessment after the injury was sustained, such provision would have been effective, and it is claimed that the policy in the present case does contain such provision in the condition above set forth.

The condition of the policy seems to be peculiarly worded. It makes the actual payment of the respective premiums when due, *a condition precedent to the renewal of the policy for another term, whether the insured is entitled to indemnity at the time or not.* The construction claimed by defendant must have the effect to make it necessary that the assured shall continue his policy in force after the accident, if he is to receive any benefit from it. This would mean that the payment of premiums before the accident, no matter how long continued, could have no effect to give him insurance unless he continued the payments after injury. The condition so construed would make the benefits to be derived, depend wholly upon payments made after the accident and not upon payments made before. Another way of stating it is that the policy provides that it must be renewed from month to month after the accident happens or there is no insurance, no matter what may have been paid before the accident. It means also that the defendant company may withhold payments from the assured after the accident and that he shall have no right to have such payments credited on his premiums to keep the policy alive, but must pay the premiums and trust to the company to pay him the indemnity.

I do not know whether the company inserted this condition of the policy with this understanding of its meaning or not. Perhaps it did. But construing the policy as favorably to the assured as can be, which I understand the law requires, I am inclined to hold that the meaning of the condition expressed in the policy is that where one has been injured and is entitled to

benefits, or whether he has been injured and is so entitled or not, the payment of the premium is a condition precedent to the renewal of the policy as an insurance against future injuries, not as a condition of the payment of the indemnity for injuries before sustained. The assured might be injured, disabled, and entitled to his indemnity for that injury and disability, but still desire to continue his policy as an indemnity against future injury, and in such case he must, according to what I think is a not unreasonable construction, pay his premiums when due, even though the company should at the time owe him money for injuries sustained. I think the words, "a condition precedent to the renewal of this policy" may fairly be construed to be a condition precedent to its renewal as an indemnity for future accidents. It would be a hard case if the insured had paid his premiums a long time before the accident and if after the accident, being "wholly and continuously disabled," he should not be able to continue his payments of premiums, he should find himself without indemnity for the injury sustained. If it should be said that he could take his \$8 per week and pay his premiums out of it then it would seem to follow that his insurance really never amounted to \$8 per week, but a less sum. I think the construction I have given is more reasonable.

But if this is not the proper construction of the condition of the policy, there is authority for holding that a condition such as defendant claims the condition in this policy to be, is inoperative. It is true that in the case of *Burkheiser v. Mutual Accident Assn. Co.*, *supra*, the court by making mention of the absence of any such condition from the policy might be thought to imply that if there had been such a condition it would have altered the case, but the point did not arise in that case and it was not necessary that it be decided there. But the case of *Seyk v. Millers National Ins. Co.*, *Lawyers Reports Ann.*, Book 3, 1889, Wisconsin Supreme Court, page 523, bears upon the question as to the force and effect of such a condition. That was not an accident case but a fire insurance case, but it was claimed that the policy became void for the non-payment of an assessment after a loss. It is said:

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"By reason of the destruction of the insured property the obligation of the insurer to pay the loss became absolute subject only to the conditions that due proofs of loss should be made. Thus relation of debtor and creditor existed between the parties when the plaintiffs made default in respect to the assessment, and it is immaterial that the amount of the loss was not actually due when the assessment became payable. The by-laws do not provide that a default after loss shall forfeit such indebtedness, but only the contract of indemnity; and when the default occurred there was no contract to be forfeited. But had the by-laws contained the additional provision that a default in the payment of an assessment after the liability of the insurer on the policy had become fixed and absolute (which it does not) we should then have the question decided in *Dogge v. Northwestern National Insurance Company*, 49 Wis., 501, and in *Alkan v. New Hampshire Insurance Company*, 53 Wis., 136, wherein it was held that, after liability actually attaches under the policy, the entire relation between the parties is changed from that of insurer and insured to that of debtor and creditor; and clauses in the policy which provide that certain acts or omissions of the insured shall invalidate it are inoperative." See also, 2 Wood, Ins., p. 758, Section 361.

"We think the rule and reasoning of those cases would be applicable here, did the by-laws of the company contain the provision above suggested; and we should be compelled to hold the provision void."

In the case referred to of *Dogge v. Northwestern National Insurance Company*, 49 Wis., 501, the court say on page 503, quoting *Wood on Insurance*, 189, as follows:

"The contract while the risk is active is personal and the parties contract in reference to the *delectus personae* of each other; therefore the obligation can not be changed without the insurer's consent. But when liability actually attaches under the policy the entire relation is changed and the relation of insurer and insured is changed to that of debtor and creditor, and the *delectus personae* of the contract is no longer material."

In *Alkan v. New Hampshire Insurance Company*, 53 Wis., 136, above referred to, it is said in the syllabus:

"A condition in a policy, purporting to invalidate the contract of insurance for an assignment made after the insurance

money becomes due, would be void as inconsistent with the covenant of indemnity and as contrary to public policy."

The court say in the opinion, page 145:

"It is an elementary rule of law that if a condition or exception in a gift or grant inconsistent with or repugnant to the nature of the estate given or granted, is void, it must be rejected."

After citing instances, the court say:

"No good reason is present why the rule is not on principle equally applicable to covenants and contracts. If it is, then it seems very clear that a condition in a policy of insurance that an assignment after loss and especially after the liability of the insurer has become absolute by compliance on the part of the assured with all conditions subsequent, shall forfeit the contract and invalidate the policy, is in like manner void, for certainly such a condition is entirely inconsistent with the contract of indemnity after the liability of the insurer has become absolute, and only the ordinary relation of debtor and creditor exist between insurer and assured."

The court further say on pages 146 and 147, referring to and quoting from the decision of the Supreme Court of Pennsylvania in *West Branch Insurance Company v. Helfenstein*, 40 Pa. St., 289, quoting from the opinion of Justice Woodward, as follows:

"The policy, bristling all over with sharp conditions, has one for this occasion, and the company attempt to impale the plaintiff upon it. The condition is, that neither the policy nor any claim thereunder shall be assigned either prior or subsequent to a loss, except with the consent of the company manifested in writing; and in case of transfer, without corporate consent, 'this policy shall thenceforth be void and of no effect, and any liability of said corporation upon such claim shall thenceforth cease.'

"However competent it was for the company to make their contract of insurance dependent on such a condition, it was not competent for them to limit the legal effect of a claim thereunder after loss."

It seems to me that where one takes a policy of insurance against injury by accident, and pays the premium and the accident insured against occurs and injury is sustained, a provision in the policy that no indemnity shall be paid unless the assured

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shall continue the policy in force after the injury, is inconsistent with and repugnant to the insurance provided. To say we will insure you against injury by accident for a premium of so much per month provided you will continue the insurance and pay the premiums after the accident and thus keep the policy in force as long as the disability exists, seems to me unreasonable. It is a little difficult to say in such a view, what the premiums before the accident were paid for.

A person taking such insurance, I think, could hardly be held to have understood unless it was very clearly expressed, that if he paid his premiums with a view to procuring indemnity for injuries by accident, he would not have the indemnity unless he, after the injury, continued the insurance.

I can not but think that the construction I have given above to the provision of the renewal of the policy, namely, that it is a renewal against further accident and injury, is the more reasonable; and I can not but think that if the construction contended for by the defendant is the true construction the condition ought to be held inoperative.

A judgment for the plaintiff will therefore be entered.

THE LICENSING OF POOL ROOMS.

Common Pleas Court of Franklin County.

DAVID HANDLEY v. THE VILLAGE OF WESTERVILLE ET AL.

Decided, September 27, 1911.

Municipal Corporations—License Fees for Regulation of Pool Rooms—Fee Not a Tax. When—Motive of Public Officers in the Requiring of a License Not Material.

An ordinance regulating pool rooms, which places a license fee of \$15 on each pool table maintained in a pool room within the corporate limits, will not be held invalid on the theory that it is a tax for revenue purposes, or for the reason that it has been levied with the intention of prohibiting pool rooms altogether.

Thomas H. Clark, for plaintiff.

H. B. Jones, contra.

DILLON, J.

The plaintiff seeks to enjoin enforcement of an ordinance of the village of Westerville, which in regulating pool rooms places a license of \$15 on each table. The plaintiff has six tables, so that under this ordinance it would cost him \$90 per year for the privilege of operating the pool room.

That pool rooms require regulation, and indeed more than ordinary regulation, can not be questioned.

The attack upon the ordinance in question in this case, however, is based upon the claim that it is nothing more than a tax for raising revenue which, of course, is forbidden, and if not for that, perhaps it answers the secondary purpose, to-wit: that there is a plan or scheme on the part of the village to prohibit pool rooms altogether.

I can not agree with either one of these contentions. So far as the ordinance itself must be construed by the court, it may be admitted that this license fee is high, and this would be especially true if there were a great many pool rooms in the village of Westerville, since one or two officers at the most could very easily regulate a large number of pool rooms and enforce the laws as to closing at 9 o'clock, enforce the law as to minors, and preserve general order among those who are accustomed to congregate in and on the outside of a pool room. The village of Westerville pays its officer now the sum of \$150 per year. This is inadequate, and if plaintiff had to pay \$90, still it would not be sufficient money to adequately pay for one or two men to keep order in the town generally. Indeed it was, I believe, shown at the trial of this case that the village was without funds to pay more or to hire an additional officer. Nor will courts in determining whether or not the license is in effect a tax nicely measure and take into account the exact amount of money which ought to be raised. The fact that the sum raised by the license exceeds what is actually necessary to regulate has been held over and over again not a reason for annulling the law. This has been held in regard to all revenue raised by license, and, indeed, it has been held that such money may be devoted to an entirely different fund.

Since, therefore, it was the legal right of the council to pass this ordinance, the motive which inspired it can not be inquired

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into and can not be used as a means or a reason for annulling the ordinance, under the well settled doctrine that that which a man has a legal right to do can not be affected by the motive which inspires him to do it.

My opinion, therefore, is that the ordinance in question is valid and the injunction prayed for must be denied and the action dismissed at plaintiff's costs.

ADMINISTRATION OF THE ESTATE OF A FOREIGNER.

Common Pleas Court of Mahoning County.

ESTATE OF GEORGE STINGACS, DECEASED.

Decided, April, 1911.

Estates of Decedents—Right of Appointment of Administrator Where Treaty Provisions Apply.

Where the accredited representative of the Austro-Hungarian Government appoints a representative to act, in his absence, as administrator of a deceased citizen of the Austro-Hungarian Monarchy, and the appointment is made a matter of record in the probate court of the county in which the death of the decedent occurred, it becomes the duty of the probate court to appoint such accredited representative as administrator of the estate of the said decedent, statutory provisions to the contrary notwithstanding.

William B. Stewart, for the Austro-Hungarian Consulate.

WILKINS, J.

This proceeding came into this court upon appeal from the probate court of this county, it appearing that application was made to said court for the appointment of an administrator of the estate of said Stingacs, deceased; and that the administrator under said application was removed upon motion of Ernest Ludwig, consul of the Austro-Hungarian Monarchy, the decedent being a subject of his Majesty, the Emperor of Austria and King of Hungary.

The only question which the court is called upon to determine is, whether or not the consul of the Austro-Hungarian Govern-

ment under the treaty between that Government and the United States, can designate a representative to act for him as administrator of this estate, it being conceded that under the treaties between the two governments, the consul or vice-consul or other accredited representative of the Austro-Hungarian Government would have the right to be appointed as administrator of the estate of any citizen of his own government who died within his jurisdiction without will or testament.

The treaty between the United States and His Majesty, the Emperor of Austria and King of Hungary, provides among other things "that the high contracting parties grant to each other the liberty of having, each in the ports of the other, consuls, vice-consuls, commercial agents and vice-commercial agents of their own appointment, who shall enjoy the same privileges and power as those of the most favored nations."

And in the treaty between the United States and Austria-Hungary, Article XV provides: "consuls-general, consuls, vice-consuls and consular agents, also consular pupils, chancellors and consular officers shall enjoy in the two countries, all the liberties, prerogatives, immunities and privileges granted to functionaries of the same class of the most favored nation."

Article XVI provides: "in case of the death of a citizen of the United States in the Austrian Hungarian Monarchy, or of a citizen of the Austrian Hungarian Monarchy in the United States, without having any known heirs or testamentary executors appointed by him, the competent local authorities shall inform the consuls or consular agents of the state to which the deceased belonged, of the circumstances, in order that the necessary information may be immediately forwarded to the parties interested."

It appears from the record in this case that the decedent left no known heirs or testamentary executors by him appointed, so that the question arises, can the consul designate a representative to act as administrator to represent him during his absence, it being conceded that he has no office or headquarters in Trumbull county.

It will be observed that the treaties between the two governments provide that the representatives of each shall have in addi-

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tion to the powers specifically enumerated in the treaties in question, all of such powers, rights and privileges granted by any other treaties to the most favored nations.

So that it will be necessary in determining this question to examine the various treaties between the United States Government and other nations as well as those between the United States and Austria-Hungary, to determine what rights and privileges the consul may have under the circumstances presented in this case.

Section 2 of Article VI of the Constitution of the United States provided this: "The Constitution and the laws of the United States made in pursuance thereof and all the treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges of every state shall be bound thereby, anything in the Constitution and laws of any state to the contrary notwithstanding."

The treaty is therefore the law of the land, and the judges of every state are as much bound thereby as they are by the Constitution and the laws of the federal and state governments. It is therefore the duty of the judicial tribunals of Ohio to take cognizance of the rights of persons arising under the treaty to the same extent as if they arise under the statute of the state itself.

This is the law of Ohio as laid down by our Supreme Court in the case of *State v. Vanderpool*, 39th O. S., 276-7, so that regardless of any provisions of the General Code, designating who may be appointed administrators of the estates of residents of this state, we are required to follow the provisions of the treaties, and statutory law of the state must give way to the provisions herein set forth. Keeping in mind that we are dealing with the rights and property of the subject of a foreign government, we can see many reasons why the representative of that government should have control of the property of one of its citizens who may have died in this country. The Common Pleas Court of Tuscarawas County, 9 N.P.(N.S.), 369, laid down the rule that "a claim for wrongful death is a chose in action, and as such is property and a part of the special estate of the decedent, to

be recovered in the name of the administrator for the benefit of the beneficiaries named in the statute." The treaty between the United States and the Argentine Confederation provides that, "if any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul general or consul of the nation to which the deceased belonged, or the representative of such consul general or consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

By reason of the use of what is known of the most favored nation clause in the treaty between the United States and the Austro-Hungarian Government, we must read this provision found in this treaty between this government and the Argentine Confederation. It therefore seems clear to me, that the accredited representative of the Austro-Hungarian Government, being located at Cleveland, is absent from Trumbull county, and if he appoints a representative to act for him in his absence, and such appointment is so made as to become a matter of record under the authority of the accredited representative in the probate court of this county, then it would be the duty of the probate court to appoint such representative so elected and designated by the accredited representative of the Austro-Hungarian Government, upon certificate of the consul of his absence as provided by the treaty.

The appointment of such a representative should not be made in an informal manner, but in such a way that the record of the probate court will clearly show that he was so designated and selected to act in the place and stead of the consul himself, in his absence, and when that is done the probate court has no discretion but is required to appoint the representative so designated as administrator.

A decree may be entered accordingly.

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Castle v. Finley.

**EFFECT OF DISMISSAL FOR WANT OF JURISDICTION
OVER DEFENDANT.**

Common Pleas Court of Franklin County.

CASTLE V. FINLEY, STATE OIL INSPECTOR.

Decided, October, 1911.

*Dismissal—Not a Hearing on the Merits. When—Final Order—Appeal
and Error—Sections 10382 and 12241.*

1. The hearing and granting of a motion to dismiss for the reason that the court is without jurisdiction over the person of the defendant, is not a hearing which involves the merits of the case.
2. The sustaining of such a motion is a final order to which error will lie, but is not a final judgment from which an appeal can be taken.

Wilson & Rector, for plaintiff.*Timothy S. Hogan*, Attorney-General, contra.

RATHMELL, J.

Defendant appearing for sole purpose of objecting to the jurisdiction of the court over him as defendant, and no other purpose, moves to dismiss appeal for reason the court has not jurisdiction of the person of defendant.

The motion has been argued upon two points; first, whether or not the defendant entered his appearance by the motion below; second, whether or not the case is appealable.

Motion was made in the justice's court by defendant reserving appearance except for the sole purpose of objecting to the jurisdiction of the court over him as defendant, and for no other purpose; to set aside service of summons and to dismiss the bill of particulars for the reason that the court had not jurisdiction of his person. The court sustained the motion and plaintiff below appealed.

It is contended that the matter "to dismiss the bill of particulars" and "to dismiss the appeal" in such a motion invokes and involves the merits of the case. We think not, if such an action is on the ground that the court had no jurisdiction of the person

of defendant and nothing more. The motion in *Smith v. Hoover*, 39 O. S., 249, called on the court to dismiss the action, grounded on the appearance of defendant in the court for the sole purpose of objecting to the jurisdiction of the court over his person.

We think the hearing on the motion in the justice's court did not involve the merits of the case, and that defendant did not enter his appearance except specially by his action there under said motion.

(2) It is further claimed that the ruling of the justice on the motion was a final judgment to which appeal lies. The justice of the peace sustained the motion below.

The ruling of the justice below was a final order *which prevented a hearing of the action upon its merits*, and one coming within General Code, 12241, but not a final judgment contemplated by General Code, 10382. Under the former, error lies. An appeal is not a substitute for a proceeding in error, but a means of a second trial of the entire cause. (44 O. S., 318-328.)

That the order of the justice below on the motion was not a final judgment, we think finds some similarity to the order in *Stramburgh v. Doran*, 2 W. L. M., 601, and *Evans v. Idler*, 7 O. S., 234.

The attack on the summons below was on the ground the court had no jurisdiction of the person of defendant. It challenged the validity of the service.

In the latter case above cited, the court in its opinion says:

"An order of a court of common pleas that a case be stricken from the docket for want of service, and for the payment of costs, is not a final judgment from which an appeal lies to the district court, but is a final order for error in which a petition in error is the proper remedy."

We think the motion under consideration is well taken and it is sustained.

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Distilling Co. v. Mihalovitch.

INFRINGEMENT OF TRADE NAME BY RECEIVERS.

Superior Court of Cincinnati.

THE STAR DISTILLERY COMPANY V. THE MIHALOVITCH-FLETCHER COMPANY.

Decided, November 3, 1911.

Receivers—Not Liable in Infringement of Trade Name on Gross Profits, When—Proceeding for Accounting of Profits of Alleged Infringement—Determination of Expenses, Losses, etc.—Sales Not Properly Included in an Accounting of Profits.

Where, under orders of court, receivers were engaged in running a complicated manufacturing corporation which had been manufacturing fruit syrups, flavoring extracts, etc., under the name "Vionana" and where such name had been adopted and used on its goods upon the actual suggestion of the intervenor who had been in charge of the Vionana department, and who previous to such employment owned and controlled all the stock of the Vionana Specialty Company, a separate corporation, which had manufactured similar goods, and where such name had never been registered as a trade-mark, and where the apparent evidence of ownership of such name, in the shape of transferred certificates of stock and the stock-book of said specialty company were in the possession of the Mihalovitch-Fletcher Company and receivers, and where it appeared that such corporation spent thousands of dollars advertising its goods under such name and claimed to be the owners of such trade-name, and under such circumstances and upon advice of counsel receivers continued to use such name, notwithstanding intervenor notified them not to do so;

Held (1): That, irrespective of the court's ultimate finding upon the question of ownership in such trade-name, the receivers, under the circumstances, were justified as reasonably prudent business men in believing the name was the property of the corporation and could not be charged with fraud or intentional wrong in continuing to use the name as same had been used when they took over the business; and

Held (2): That in a proceeding for an accounting of profits for alleged infringement by receivers, considerations of equity must be applied in determining the amount of profits to be allowed. In such case net and not gross profits will be allowed, after deducting a ratable proportion of the general expenses incurred by the receivers in the operation of said business. *Regis v. Jaynes*, 191 Mass., 245; *Nelson v. Winchell*, 203 Mass., 75, distinguished.

- (3) In determining the expenses chargeable against gross profits, store-rent, clerk hire, fuel, power and the general expenses of the receivers in conducting such business are to be deducted in proportion as the aggregate sales in such department bear proportion to the sales in all departments. The rule in the *Tremolo Patent Case*, 23 Wall., 518, followed.
- (4) Losses, such as bad debts, discounts, etc., incurred in the sales of goods sold under such trade-name are also to be deducted in ascertaining the net profits of the sales.
- (5) Goods sold in bulk, to which no such labels are attached, but bearing a stock shipping tag affixed by some clerk, and which tag was in no way descriptive of the character of the goods and, which tag was affixed without direction of receivers and without evident intention to violate the court's decree, are not properly included in the accounting.

Kelley & Follett, for intervenor.

Sidney G. Stricker and Harmon, Colston, Goldsmith & Hoadly,
contra.

HOFFHEIMER, J.

This matter came on to be heard on the receivers' motion, (a) to modify the decree heretofore entered herein; (b) on exceptions by receiver to the report of the special master in the matter of the accounting; and (c) on motion to refer back to the special master for correction; and also on application of the intervenor, Beekman, to modify the decree heretofore entered herein.

Taking up intervenor's application first, the court it may be noted, is asked to strike out of said decree, certain operating expenses enumerated in said decree, and in the 6th finding thereof, for the reasons that none of said operating expenses are a proper charge to be borne by the business done by the receivers, in goods carrying the trade-mark "Vionana" and that none of said expenses were made necessary or were in any way increased, by the carrying on of the Vionana department, in connection with the other business carried on by the receivers, during the accounting period, and because none of said expenses, as matter of law, are properly chargeable against the business done by the receivers, in goods carrying the "Vionana" name.

Reliance for this application is placed on *Regis v. Jaynes*, 191 Mass., 245; *Nelson v. Winchell*, 203 Mass., 75, and certain other cases.

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If the rule of these cases is to be applied here, then obviously these receivers (unless it could be said they sustained the burden and proved by that method to what extent the operating expenses of the entire business were increased by carrying on the "Vionana" department, which it is insisted they made no endeavor to do), must be held to account to intervenor on the *gross*, instead of on the *net* profits, as this court has heretofore decreed.

The rule which intervenor contends for, however, is an extreme one, and attention to the cases cited will show, that it is based on the principle that "the wrong-doer should not be permitted to derive a direct advantage from his own wrong" (*Regis v. Jaynes*, 252); and if by reason of his wrong the infringer causes confusion of property or of goods, he does so at his peril, and, if unable to separate the items, he must pay the penalty for his wrong.

All the cases cited by intervenor show that the respective courts had uppermost in their minds the fact that the person against whom the rule was declared was a wrong-doer, who might derive some personal profit or advantage by reason of his own wrong, unless such rule were invoked.

That it was this element of fraud or wilful wrong-doing that called for the rule, is well illustrated by the language of the court in *Benkert v. Feder*, 34 Fed., 535 (cited by intervenor):

"One who *deliberately* and *knowingly* uses another's trademark, commits a palpable and unmitigated fraud, for which there is no possible excuse."

In *Regis v. Jaynes*, and in *Nelson v. Winchell*, the court announce, in substance, that the wrong-doer is not to be permitted *directly* or *indirectly* to profit by his own wrong; and the same reasons underlie *Menendez v. Holt*, 128 U. S., 514. However just such rule may be in a typical infringement case, where such element of intentional or wilful appropriation of another man's property is present, and where there is possibility of personal profit or advantage in the wrong-doer, this case presents no such considerations. This was not a case of piracy nor wilful, deliberate or intentional appropriation on the part of these receivers

of intervenor's property for purposes of private gain or otherwise. The receivers could not have derived any personal advantage, "directly or indirectly," in what they did. These officers simply took over and attempted to run in good faith, and for the benefit of *others*, this vast, confused and complicated business, and as it was cast into their hands. This business included the "Vionana" department, ownership of which trade-mark intervenor subsequently claimed.

A long time prior to the receivership, intervenor himself, then in the employ of the Mihalovitch-Fletcher Company, (and he was in their employment practically up to the time of these proceedings,) *suggested that the firm use this name*, (see Beekman's testimony, pp. 41, 42); and the firm did use it. And the manner in which the name had been and was being used by the firm, the fact that it had spent many thousands of dollars in advertising it, as its "Vionana" Department, reinforced by the further fact that it had in its possession the apparent ownership of title in the shape of the transferred stock-books and certificates of the Vionana Specialty Company, certainly all of these were circumstances which would have justified any reasonably prudent business men, especially after taking advice of counsel, as was done here, in believing, just as receivers believed, that this name, "Vionana," was the property of the Mihalovitch-Fletcher Company, irrespective of the ultimate conclusion of this court, when it came to try the question of title. All these circumstances, it seems to me, should, in fairness, be construed so as to relieve these receivers from all imputation of fraud or wilful wrong-doing, and so as to save the estate from the application of a rule, which, as I have endeavored to point out was intended and designed to prevent the wrong-doer himself from personally benefiting or profiting by his own wrong. Even if these receivers, in continuing to use the name after Mr. Beekman gave notice of ownership, were in the wrong, I do not believe, under the circumstances as detailed, the creditors ought to be penalized for such error, and particularly where such error was partly the result of intervenor's own act in originally suggesting the use by the firm of the name "Vionana" in connection with the Mihalovitch-Fletcher business, and in otherwise acquiescing in a course of business

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which gave the receivers reasonable grounds to believe they were the owners. In apparent conflict however with the cases cited by intervenors is the Tremolo patent case.

In the Tremolo patent case (23 Wall., 518), the court say:

“The defendants, vendors of organs generally, and selling sometimes organs having a patented invention consisting of a combination of what was called a ‘tremolo attachment’ with the organ; and selling sometimes organs without the attachment, were decreed guilty, in their sales of organs with the attachment, of infringing the complainant’s patent.

“*Held*: 1. That in the ascertainment of profits made by them from sales of organs with the tremolo attachment it was proper to let them prove the *general* expenses of their business in effecting sales of organs generally, and deduct a *ratable proportion* from the *profits* made by the tremolo attachment.”

And in the opinion of the court, it is stated:

“We can not see why the general expenses incurred by the defendants in carrying on their business, such expenses as store rent, clerk hire, fuel, gas, portorage, etc., do not concern one part of their business as much as another. It may be said that the selling a tremolo attachment did not add to their expenses, and therefore that no part of those expenses should be deducted from the price obtained for such an attachment. This is, however, but a partial view. The store rent, the clerk hire, etc., may, it is true, have been the same, if that single attachment had never been bought or sold. So it is true that the general expenses of their business would have been the same, if instead of buying and selling one hundred organs, they had bought and sold only ninety-nine. But will it be contended that because buying and selling an additional organ involved no increase of the general expenses, the price obtained for that organ above the price paid was all profit? Can any part of the whole number sold be singled out as justly chargeable with all the expenses of the business? Assuredly no. The organ with a tremolo attachment is a single piece of mechanism, though composed of many parts. It was bought and sold as a whole, by the defendants. It may be said the general expenses of the business would have been the same if any one of these parts had been absent from the instrument sold. If, therefore, in estimating profits, every part is not chargeable with a proportionate share of the expenses, no part can be. But such a result would be an injustice that no one would defend.”

See also, *Walter Baker & Co. v. Slack*, 130 Fed., 520.

It will thus be seen that the court in the Tremolo patent case has laid down a rule more *liberal* than the one in *Regis v. Jaynes* and similar cases, and whether we consider the Tremolo patent case as an ordinary *infringement* case, or attempt to *distinguish* it as Sawyer, J., has endeavored to do, in *Benkert v. Feder* (*supra*, p. 535), it is sufficient authority for the rule heretofore announced by this court. If any equitable considerations prompted the rule in the Tremolo patent case, certainly such considerations are present here.

In view of the foregoing, the court is of opinion that justice will be best subserved by adhering to the rule heretofore announced, and accordingly, intervenor's motion to modify the decree in the particulars mentioned will be overruled.

With reference to the first specification in receivers' motion to modify the decree I am of opinion that the amount of goods "carrying private labels and no labels," and fixed in the decree at \$15,567.64, should be increased, in accordance with the claim of receivers and according to the figures of Mr. Sibbald, the bookkeeper and afterwards expert. While it may be true that the shipping clerk may have appended some stock labels upon which appeared the name "Vionana," I do not think that these cherries in bulk were sold as Vionana goods. It does not appear that the receivers intended or ordered that such labels be affixed, nor does it appear that these labels were descriptive in any way of the character of these bulk cherries. The mere fact that some shipping clerk may have attached such label without intending to do wrong hardly brought these goods within the spirit of the court's ruling.

The decree should be altered or amended in the other specification also, and as set out in receivers' motion.

Exceptions 1, 2, 3 and 4 of receivers to the finding of the special master go to the cost of cherries, but, as I understand it, after eliminating from consideration all other elements which had been agreed upon by the parties, such as cost of sugar used in processing, amount and value of sugar absorbed by raw fruit in processing, etc., the claim is, that the special master, in reaching his conclusion, erred on the amount, that is to say, the num-

ber of pounds of pitted fruit in a case of six half gallons of whole cherries.

The evidence on this subject before the master was conflicting, but upon reading same and considering it, I am inclined to think his conclusion was a fair one and justified by the evidence. And this would appear the more so, in view of the practical experience of the receivers themselves while conducting the business. In the absence of any palpable or material errors, even though there may be some slight discrepancies, I am of opinion that these exceptions should be overruled.

Exceptions 5-14. According to the Sibbald Report (p. 9), it is practically conceded by intervenor that there is a difference of \$314.81 on the profits on the aggregate of "soda water goods" and "grape juice" sales in favor of the receivers, for which the master failed to give credit. Since this is conceded the exceptions will be allowed and the report will be referred back to be accordingly amended.

Exception 15 goes to the special master's finding on gross profits. In view of what has been said herein on additional no label goods and additional returned goods, and Mr. Sibbald's figures (p. 9), this exception will be allowed, and the report will be referred back to be amended in this respect.

Exception 16. Complaint is made that the special master wholly failed to consider, in ascertaining the profits, the items set forth in this exception. Of this amount, intervenor concedes that \$2,325.65 is a proper charge, but contends that \$920.47 of said items, representing cost and expense for freight, outbound and inbound, and bad debts, are not proper charge, upon authority of *Nelson v. Winchell* (*supra*). For reasons elsewhere stated, this court has not followed that case, and if it is not in error in so doing, and there being no dispute that the sum \$920.67 was expense necessarily and actually incurred, this sum, together with \$2,325.65, should have been taken into account by the master. The exception is, therefore, allowed, and the report will be referred back to be amended accordingly.

Exception 17. As part of the expense necessarily incurred, and in accordance with the reasons just stated, the master should have allowed the item of \$266.82, being for salesmen's salaries and ex-

penses for taking orders previous to date of accounting for goods which were shipped during the period of accounting. Exception 17 is allowed in such particular, and the report will be amended accordingly.

Let a decree be prepared in accordance herewith.

VALIDITY OF THE SMITH ONE PER CENT. LAW.

Common Pleas Court of Franklin County.

THE STATE OF OHIO, EX REL THE VILLAGE OF GRANDVIEW HEIGHTS,
V. FRED M. SAYRE, AS AUDITOR OF FRANKLIN COUNTY,
OHIO, ET AL.

Decided, October 30, 1911.

*Taxation—Limitations on the Power to Levy Become Unconstitutional,
When—Impairment of Contracts—Function of Budget Commission
—Discretion of, Will Not Be Interfered With, When—Sections
5649-3a and 102 O. L., 266.*

While it is probable that contracts entered into in good faith by a municipality prior to the enactment of the Smith one per cent. law would be protected by constitutional guaranties against impairment by limitations on the taxing power, yet mandamus lies to compel the placing on the tax duplicate of the levy provided in the budget as originally fixed, and thereafter reduced by the budget commission, where nothing is shown beyond a possibility that contracts may be impaired or payments be delayed, and it does not appear that the discretion lodged in the budget commission has been abused, and there is nothing more than a difference in judgment between the budget commission and the corporation as to needs for the year, and the corporation failed to avail itself of its opportunity to present its case to the commission.

Smith W. Bennett, for relator.

E. C. Turner, H. C. Sherman and Clarence Laylin, contra.

DILLON, J.

The relator alleges that the county board of budget commissioners, acting pursuant to the provisions of Section 5649-3a of the General Code of Ohio (102 O. L., 266), corrected and re-

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duced the budget as presented by the said village, striking from said budget the amount of \$1,501.94, all of which is necessary for the needs of the said village. The relator submitted its annual budget setting forth in itemized form its estimate for the monies needed for the incoming year; and in order to make appropriations for each of the several objects for which money had to be provided from the monies known to be in the treasury, from the collection of taxes, and all other sources of revenue, and all expenditures within the following six months, and to provide for the payments of the amounts of money necessary to carry out the terms of contracts made and entered into by and between the relator and others prior to June 1st, 1911, it was compelled to and did provide in said budget for a levy on the taxable property of the corporation of a sufficient number of mills to provide the sum of \$3,800. The petition further alleges that the defendant in examining the budget claimed to have found that this levy and rate of taxation exceeds the authorized amount which may be levied by the relator and so decreased the said tax rate, striking from the budget the said sum of \$1,501.94, and re-adjusting the balance, to-wit, \$2,298.06, to the various needs of the village.

The plaintiff says that the act, 102 O. L., 266, commonly known as the Smith one per cent. law, thus limiting the said village to a one per cent. tax rate, is invalid and unconstitutional in so far as its strict enforcement in this case would impair the obligations of two contracts made and entered into by said village prior to the enactment of said law. It is further claimed that the said law is invalid in that it also violates Section 26 of Article II of the Ohio Constitution, in that it is not of uniform operation throughout the state.

The defendants' answer, in substance, alleges that the said village will have a sufficient amount of money to carry on its needs under the tax rate as fixed, and that they gave the relator a hearing and carefully went over all the items of necessary expenses for the running of said village, and that the amount which they fixed is just and ample to meet all its needs, when taken into consideration with other funds which the said village has or will have at its disposal.

The answer also alleges that at the hearing the said relator failed to avail itself of its right to inform the budget commission of the facts desired by it, and that, although it appeared by its regular counsel, it refused to make any suggestions or to assist the budget commissioners.

A great many of the different items are set forth in the answer justifying the action of the budget commission in detail. A denial of some of these items is made in the reply.

It is sought in this case to have the court render an opinion as to whether or not the so-called Smith one per cent. law can constitutionally apply in a case where a municipality has previously to the enactment of said law entered into valid contracts, which said contracts would be impaired by the enforcement of said law as to them. The question is most interesting and it is highly probable that the decisions of the courts will sustain the contention of the relator upon that naked legal proposition. It must be conceded that a contract may be impaired by limitation of taxation power, and even be destroyed, and therefore, the constitutional guaranty in all probability protects such contracts as were made in good faith prior to the enactment of such law. But I do not consider this question involved in this case.

The two contracts referred to are as follows:

One, employing legal counsel pursuant to the provisions of Section 205 of the Municipal Code, amounting to \$300 per year; and one for sewer expense amounting to \$300.

It will be noted that the parties to these contracts themselves are not complaining here, and it is doubtful whether or not at this present time the contracts could be impaired, even if it be assumed that there will be such a deficiency in revenue as will not meet them. A mere possibility of impairment and a mere possibility of delay in payment does not necessarily constitute an impairment, such as should interfere with the taxing power; but in this case the budget commission, acting pursuant to said Section 5649-3a and following sections, had a function to perform, just as much as did the village itself. This law lodges in this county budget commission the express power of adjusting the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to

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be levied by law. This budget commission has power to revise and change the estimates, and reduce any or all the items submitted to it.

This court, therefore, will not substitute its discretion for that of the budget commission, unless it clearly appears that its discretion has been abused. It does not so clearly appear in this case. Agreeably to the well settled maxim of law, this court will presume in favor of the correctness and legality of the proceedings of this budget commission. The court is left in considerable doubt in this case as to some of the facts. The burden is upon the relator to show clearly to this court that the actual necessity exists which it claims exists. So far as the evidence in this case shows, it is simply a disagreement—a difference in judgment—between the two as to the needs of the village.

Again, the village had an opportunity to be heard after the budget commission had charge of the case, and relator failed to avail itself of any additional facts other than what had already been presented to the said commission.

There is a dispute between the parties as to some of the needs of the village, as well as to some of the sources of income which the village will have. The court will again adopt the finding of the budget commission in whom is lodged the power to decide in such case.

So far as the village itself is concerned, it must, like all other municipalities and all other individuals as well, live within its means, and I can not find in this case that there is any ground for the court to interfere with the action of the budget commission.

Judgment, therefore, will be rendered accordingly.

**INHERITANCE BY A WIDOW WHO HAS TAKEN UNDER
HER HUSBAND'S WILL.**

Common Pleas Court of Van Wert County.

SARAH J. BOWERS V. NANCY ANN MCGILL ET AL. *

Decided, November, 1911.

*Wills—Testator Dies Intestate as to Some of His Property—Widow
Elects to Take Under the Will—Not Barred thereby from Life Es-
tate in Lands Not Covered by the Will—Descent and Distribution.*

Election by a widow to take under the will of her deceased husband does not preclude her inheritance of lands as to which her husband died intestate and to which no reference was made in his will.

O. A. Balyeat, for plaintiff.

Dailey & Hoke, for cross-petitioner.

MATTHIAS, J.

The question here considered is presented by demurrer of the plaintiff to the answer and cross-petition of one of the defendants, Nannie Hawkins, formerly Owens. The former husband of said answering defendant, John W. Owens, died March 25th, 1894, without issue. His will was probated and his said widow elected to take thereunder. By the terms of this will said widow was given one-fifth of a tract of land described, which it is conceded was an undivided interest, also all moneys, notes and stock and household furniture belonging to testator at his decease. At the time of his decease said John W. Owens was the owner of an undivided interest in another tract of land of which partition is now sought, and of this tract said Nannie Hawkins, formerly Owens, claims as widow of said John W. Owens to be entitled to the life estate in the undivided one-seventh which said John W. Owens inherited from his father, and claims that she has a title in fee to the three-forty-seconds part of said land which her husband held by purchase at the time of his decease.

The question then we are called upon to determine, is whether the election of said widow to take under the will precludes her

* Error not prosecuted.

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inheritance under the statute of descent and distribution of lands as to which her husband died intestate and to which no reference was made in his will.

Notwithstanding a number of cases have been cited by diligent counsel we find none of them involve the question we are here called upon to decide, and hence we are in no danger of accusation of an attempt to overrule our superiors in this instance.

The sections of the statute governing election of the widow and the effect of her action are 10566, *et seq.*, of the General Code. The widow is required to "appear and elect whether to take such provision or to be endowed of the lands of the deceased consort and take the distributive share of the personal estate." It is further provided (Section 10569) that "no widower shall be entitled both to dower and the provisions of the will in her or his favor, unless it plainly shows that such provision was intended to be in addition to dower and a distributive share of the estate." It is further provided (Section 10572):

"If the widow or widower elects to take under the will, she or he shall be thereby barred of dower in such share of personalty, and shall take under the will alone unless as provided in section ten thousand five hundred and sixty-nine."

Some of the cases cited by counsel for our consideration are *Corry v. Lamb*, 45 O. S., 203; *Swihart v. Swihart*, 7 C. C., 338; *Bane v. Wick*, 14 O. S., 505; *Carder v. County Commissioners*, 16 O. S., 353, and *In re McDonald*, 2 Nisi Prius, 232.

In the case of *Corry v. Lamb*, it was held that a widow electing to take the provisions made for her by the will of her husband will be barred of dower in land of which he was seized during coverture, and which was sold and conveyed on foreclosure of a mortgage executed by him in which she did not join, unless it plainly appears that she should have such provision in addition to her dower. Our own circuit court in the case of *Swihart v. Swihart*, 7 C. C., 338, applied this decision to the facts before it and held that a widow is not entitled to dower in the real estate of her deceased husband of which he died intestate, after she had elected to take under the will of her husband. If

the case we are considering were one involving the question of dower, this decision would seem binding and conclusive.

However, we incline to agree with Judge Rockel in his criticism of this decision expressed in 2 Nisi Prius, 232, and also with his conclusion that where a widow elects to take under the will of her deceased husband, she is not barred of dower in lands not disposed of by will, unless the will expressly states that the provision made therein for the widow shall be in lieu of her dower right in such undevise lands. The decision of the circuit court was based upon that of the Supreme Court in the case of *Corry v. Lamb*, notwithstanding the fact that in the latter case the husband did not die intestate as to any of his property. In the Swihart case the facts show that a portion of the lands were not disposed of by will. In the opinion since expressed by the judge who delivered the opinion in the Corry-Lamb case that was such a difference as to require a holding just the reverse of that announced by our circuit court. This appears on page 233 of 2 N. P.

In the opinion of Judge Dickman, election of the widow did not bar her right of dower in land of which the husband died intestate, the reason apparently being that in such matter the Legislature had attempted to deal only with testamentary property.

But whichever view be taken of the question considered in those cases need give little concern in the disposition of the issue here made. The statute upon which plaintiff relies has to do only with the barring of dower as a result of the election of the widow to take under the will. The interest claimed by the widow in the land in question here is not that of dower, but an estate coming to her under the statute of descent and distribution. Under the terms of the statute invoked the defendant by her election surrendered only her dower and her distributive share of the personalty. She was not called upon to elect as between the provisions of the will and something not mentioned therein, and which could not be considered a factor in the election. Under the statute she can not have both dower and the provisions of the will in her favor, and therefore if she take the provisions of the will she loses only her dower. It is provided

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by Section 10570 that "On application by a widow or widower to take under the will the court shall explain its provisions, the rights under it, and by law in the event of a refusal to take under the will." The court advises as to her rights as widow and not otherwise. He could not advise her as to property not mentioned in the will and of which he knows nothing, and possibly of which she does not then know. Only the testamentary property is then under consideration and that only need be considered.

It is held in *Carder v. County Commissioners*, 16 O. S., 353, that:

"The widow's election to take under a will does not estop her from setting up her right as heir to the estate, or from contesting the will, and controverting the validity of devises thereunder: and it is not the duty of the probate judge to advise her of her rights as such heir at the time of her election."

It is held in *Bane v. Wick*, 14 O. S., 505, that election by a widow to take under a will does not bar her right to her distributive share of the personal estate not disposed of by will. It is said by the court on page 508:

"The intention of the testator has no efficacy, and can be regarded only so far as it is apparent in the dispositions made by his will. If he has left property undisposed of, its disposition is not governed by his will, but by another rule, having its origin in another source, in the application of which the intent of the testator can have no influence. This rule operates in the same manner, as if the deceased had left no other property, and made no will. As to the devised property he is a testator; as to that not so disposed of, an intestate. *Crane v. Doty*, 1 Ohio St. Rep., 282; *Needles v. Needles*, 7 Ohio St. Rep., 432; *Nickerson, Adm'r, v. Bowley, Ex'r*, 8 Met., 424."

But it is urged that the defendant can not take this property under the statute of descent and distribution because the husband did not die intestate. But as to the property in question he did die intestate. This statute is one dealing with property, and if it is intestate property it passes in the manner marked out thereby. If testamentary disposition is made thereof that property is withdrawn from the operation of the statute; but property

not included in the will is subject to the operation of the statute regulating the descent of intestate property.

Neither does this case come within the decision in *Hibbs v. Insurance Company*, 40 O. S., 543, and other like cases there cited. In those cases it is held that the widow is bound by her election even where the testator attempts to dispose of property to which she had title, but in those all the property is mentioned; attention is directed thereto and in effect the testator says "If you take this you must permit that to go as herein directed." The widow receives a stated consideration for the surrender, there is a "*quid pro quo*." As well remarked by McIlvaine, J., in *Bowen v. Bowen*, 34 O. S., 164:

"Whether or not any other interest or claim which a widow may have in or against the estate of her husband, is satisfied by provisions in her favor in his will, must be determined not by the rule of the statute, but upon principle of reason and right which exists entirely independent of statute."

There is no provision of statute then precluding the claim which the widow of Owens here makes; the statute relied upon has no application and there is no statute that does apply but that of descent and distribution. No facts are pleaded that show her contention inequitable, but rather the contrary. She is the owner of the life estate in the property which came to her husband by descent and the owner in fee simple of the part purchased by him and she has not estopped herself from effectively setting up her claim thereto.

The demurrer is overruled.

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ENCROACHMENTS ON HIGHWAYS.

Common Pleas Court of Hamilton County.

**HAMILTON COUNTY COMMISSIONERS v. THE CINCINNATI,
HAMILTON & DAYTON RAILWAY CO.**

Decided, December 23, 1911.

Roads—Encroachment Upon, by Supports of an Overhead Railway Bridge—Public Control Over Toll Roads with Reference to Nuisances the Same as That Over Highways—Method of Establishing Width of Highway where Records Have Been Destroyed—Right to Encroach Can Not be Acquired by Adverse Possession—Sections 7515, 9235, 11219 and 11220.

1. Where the record of a roadway as shown by plats and other evidences of title has been destroyed, its width at a particular point may be established at sixty feet by the testimony of persons long familiar with the fences and land lines in that vicinity, aided by ancient private plats and surveys, and particularly by the presumption created by Section 7515.
2. No lapse of time bars an action by public officials to recover lands forming part of a highway or street, or to compel the removal of obstructions placed thereon, however long they may have been maintained and regardless of their character as to permanency.
3. The fact that the highway which is being obstructed was a toll road at the time the obstruction was placed therein and was not abandoned by the company then owning it for more than twenty-one years after the placing of the obstructions does not give title by adverse possession by rendering operative the statute of limitations.
4. Moreover a railway which is without authority under its charter to use the highways or parts thereof in such a manner as to interfere with the public use can not, after having occupied a considerable portion of a highway for a great number of years with the abutments of an overhead bridge, plead its own wrongdoing as a defense against a public demand that, on account of the great increase in traffic along the road and the construction of street railway tracks thereon, these obstructions be removed.

Hunt, Bettman & Merrell, for plaintiff.
Waite & Schindel, contra.

GORMAN, J.

This is an action brought by the county commissioners of Hamilton county, Ohio, against the Cincinnati, Hamilton & Dayton

Railway Company, in their official capacity, asking for a mandatory injunction against the defendant, perpetually enjoining it from maintaining certain abutments of solid stone construction and earth embankments behind said abutments within the limits of the Springfield pike where the same is crossed overhead by the defendant's railway near the southwest corner of the village of Hartwell, which pike is claimed to be a county road and a public highway, and sixty feet in width, but which abutments at the point aforesaid, encroach on either side of the roadway, leaving a space of but about twenty-five feet between the abutments for the traffic; and the plaintiffs further pray that a mandatory order issue to the defendant requiring it to remove said abutments and embankments from within the limits of said roadway.

The defendant by its answer admits that the Springfield pike is one of the public roads of Hamilton county and that its railway crosses the same overhead; and that there are abutments and embankments where its said railroad crosses said highway, and that the character, location and dimensions thereof are as set forth in the petition. But it denies that said Springfield pike is or ever was sixty feet in width as alleged in the petition; and it denies that its said abutments and embankments are within the lines of said highway. It admits that the county commissioners aforesaid have by resolution declared said abutments and embankments a nuisance and ordered the defendant to remove the same, but that it has refused to comply with said order.

For a second defense the defendant sets up that said Springfield pike, at the place where its railroad crosses the same and north and south thereof, was at all times owned by the Hamilton, Springfield & Carthage Turnpike Company, a corporation for profit under the laws of Ohio, until the — day of September, 1897, on which date, by virtue of the authority of an act of the Legislature passed April 21, 1890, it abandoned all that part of its said turnpike south of Wyoming avenue in Wyoming village, including that part thereof which is crossed by defendant's railroad at the southwest corner of the village of Hartwell, and that since said abandonment of said turnpike the same has been an abandoned turnpike road and that the public's rights therein are limited to the rights formerly held and possessed by said

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turnpike company at the date of the abandonment, and that at that time the said turnpike company had no right or title to that land upon which rests said abutments and embankments, because said abutments and embankments had been placed there and had been maintained in the self same places by the defendant openly, notoriously, continuously and adversely, in the possession of the defendant for more than twenty-one years prior to said — day of September, 1897, and that defendant has at all times since said — day of September, 1897, the date of said abandonment, had the legal right to maintain said abutments and embankments in the same position where they now are and were at the time of the filing of the petition.

By reply the plaintiff denies that said Springfield turnpike was at all times prior to September —, 1897, owned by said turnpike company; but avers that the part of said turnpike referred to in the petition and within the lines of which said abutments and embankments stand, was formerly a state road, and that said turnpike company, a corporation, was granted a franchise therein and right-of-way to use the same as a toll road, by act of the General Assembly in or about the year 1840; and that thereafter until the abandonment thereof, about the year 1898, said turnpike company continued to use the same as a toll road. The plaintiff further denies that the defendant has any right or title to the land upon which its said abutments and embankments stand, by adverse possession for more than twenty-one years.

The cause was heard by the court, both parties producing their evidence to maintain their respective claims. From the evidence adduced and the admitted facts, the issues of fact as to the character of this highway, its width, when it was opened for public travel, how it was used and to what width, its width between the fences, its reputed width and the time when the railroad's abutments were constructed and its embankments placed behind the same, have been determined.

The evidence to establish these facts consisted of plats and records from the offices of the county recorder, the county auditor and the county surveyor; the oral testimony of individuals who testified to the width of the pike between the fences, and the traveled portion thereof as far back as sixty-two years; and

the oral testimony of witnesses who have been well acquainted with this highway for from thirty to sixty-two years, that its reputed width has been sixty feet; also private plats of individuals more than fifty years old showing the width of this road, surveys made by surveyors and engineers showing the width of the road to be sixty feet or more. The record of this road as shown by plats, surveys, deeds or other evidence of title, if it ever existed, was destroyed in the court house fires, there having been two of such fires since this road was opened for public travel prior to 1840.

Without undertaking to review and analyze the evidence admitted, much of which was admitted over the objection of counsel for the defendant, the court is satisfied that the evidence does establish the fact that this turnpike is and has been for the past sixty-two years at least, and probably always has been—at least sixty feet wide between the lines of its right-of-way, although the traveled macadamized portion thereof has not been more than twenty-five feet. Its reputed width has been established by oral evidence to be sixty feet. The blue print of defendant which was given to the auditor of the county and may be treated as an admission against interest, shows the width of this roadway immediately adjoining the railroad company's right-of-way on the north and on the south, to be sixty feet. The property lines adjoining and abutting on this highway north and south of the railroad have been shown by engineers to be thirty feet or more from the center of the roadway on either side, and the center line of the turnpike is the section line between Sections 1 and 7, Springfield township.

It is admitted that at the time this action was commenced this turnpike was a public road, and when there is added to the weight of the evidence tending to establish its width as of sixty feet, the presumption of the law, created by Section 7515, General Code (Section 4935c, R. S.), which lays down a rule of evidence applicable to lost road records, the court believes that the conclusion arrived at that this road is sixty feet in width has been materially strengthened. That section in substance provides that all country roads whose records have been lost or destroyed and not reproduced as provided in the preceding sections of the statutes shall be *prima facie* sixty feet in width. An addi-

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tional circumstance in favor of the belief that the road is and was sixty feet wide is the fact that the turnpike company's charter authorized it to pre-empt and take a roadway sixty feet wide (see 32 O. L. L., 157; 36 O. L. L., 222, and 37 O. L. L., 241). Furthermore, Section 9235, General Code (3477, R. S.), provides that turnpikes and plank roads shall be opened not more than sixty feet wide and at least sixteen feet thereof shall be improved with stone, gravel, wood or other convenient material. In view of these matters and the absence of any evidence tending to show the width of this roadway to be less than sixty feet; and in view of the fact that it is now and has been for many years sixty feet wide immediately to the north and south of the defendant's railroad, the court feels amply justified in concluding that the probabilities are that this roadway was sixty feet wide in 1850, when the defendant built its abutments and filled in its embankments partly within the lines of this highway, encroaching thereon about seventeen and one-half feet on each side of the roadway, and thereby excluding the public from the use of more than one-half of this roadway at the point where these abutments were erected.

It appears as a fact that the defendant company constructed these abutments substantially as they now stand in the exact places where they now stand and that the embankments behind these abutments on both sides of the roadway have been used, owned and in the continuous, open, notorious and uninterrupted possession of the defendant under a claim of right from 1850 down to the present time.

Now the issue of fact, and I may say the only issue of fact in this case, is the width of this roadway—not the traveled width but the width owned, taken or which the public has and had the right to occupy and use. If then it be established as a fact or admitted for the purpose of argument that at the time the defendant company placed its abutments and embankments within the lines of this highway the width thereof was sixty feet and that defendant has maintained them therein for more than twenty-one years (which fact is undisputed), has the defendant company acquired thereby a good title by adverse possession? Or, to put it in another way, is the county through its commissioners barred from recovering possession of the parts of the

roadway occupied by these abutments and embankments because of Sections 11219-11220, General Code (4977-4978, R. S.), which limits the time for the commencement of actions to recover the title or possession of real property to twenty-one years after the cause of action accrued?

It is contended by the plaintiffs that the statute just cited does not run against the state or any subdivision of the state as to the public roads or highways which are held not in a proprietary capacity, but in a governmental capacity. On the other hand it is claimed by the defendant that even though it did place its abutments and embankments within the limits of this highway, this was done in 1850 or 1851 openly and notoriously, and at that time this highway or turnpike was a toll turnpike owned and operated by a private corporation—the Hamilton, Springfield & Carthage Turnpike Company—for profit, and that these abutments and embankments continued in the same place so long as this company owned and operated this toll turnpike down to 1897, or for a period of forty-six or forty-seven years; and that the statute of limitations does run against this private company to the same extent and as fully as it runs against a natural person or a private corporation having no public franchise; and that the defendant's title by adverse possession was good as against the plaintiff's long before this turnpike was abandoned in 1897 or 1898, and that upon the abandonment thereof the county and the public acquired only such title to the roadway as the turnpike company had at the date of abandonment.

Now it is generally if not universally held, that the statute of limitations does not run against the sovereign—the state—nor can any one acquire title to the sovereign's property by adverse possession. This appears to be the rule in Ohio. *Seely v. Thomas*, 31 O. S., 301-308; *Green Tp. v. Campbell*, 16 O. S., 11.

And it has been established by numerous decisions in this state that the statute of limitations does run against the divisions of the state, such as counties, townships, school districts and municipalities, in all matters touching their proprietary or private interests and possessions, as distinguished from their governmental interests or public interests or possessions; and as to such interests or possessions there appears to be a conflict of authorities.

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The matter under consideration is a public road or highway and the county's interest therein and that of the plaintiffs, as commissioners thereof, is governmental or public as distinguished from its private or proprietary interests. It will therefore be unnecessary to consider or cite cases and authorities which apply to the private or proprietary capacity of the subdivision of the state; but only such authorities need be considered as relate to the public or governmental capacity of the municipality, township, school district, or county as are affected by the statute of limitations. And on this phase of the law applicable to the case at bar it is scarcely necessary to go outside of Ohio to determine the rule to be applied to the running of the statute against the public.

Perhaps the earliest decision in which the Supreme Court considered the application of the rule "*nullum tempus occurrit regi*" is that of *Lessee of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298-310, in which the court held that the statute of limitations ran against the city of Cincinnati, a municipal corporation, as to certain town lots dedicated to it by the founders of the city and given for public use. A church was erected on these lots and after a lapse of twenty-one years the church claimed title to the lots by adverse possession, or that the statute of limitations barred the city from recovering the lots.

It seems to the court that these lots were not held by the municipality in its governmental capacity as the streets might be held, and that the ruling in this case may be considered as applicable to property held by the city in its private or proprietary capacity. No authorities are cited by the court to sustain its ruling in the case.

The next case is that of *Evans v. City of Cincinnati*, 5 O. S., 549, where it was held that the statute of limitations applied to an encroachment on one of the city's public streets (Main street), and that municipal corporations are subject to the operation of the statute of limitations in the same manner and to the same extent as natural persons. This doctrine the court said on pages 602 and 603, it adopted from the case of *Lessee of City of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298.

But this doctrine can scarcely be claimed to be the settled rule of law now applicable to municipalities, and especially to coun-

ties. *Evans v. City of Cincinnati* is cited and commented upon, as in view of later decisions by the Supreme Court we shall presently have occasion to point out.

Since this decision, the Supreme Court and other courts of our state have manifestly been tending away from the rule there laid down and toward the rule holding that the statute does not run against the public or any subdivision of the state whenever the public highway or roads are involved.

In *Lane v. Kennedy et al*, 13 Ohio State, 42, the court held an encroachment upon a township road (in Oxford township, Butler county) by fencing in a part thereof and occupying it for a period of twenty-one years would not bar the public authorities from recovering the land thus enclosed if the necessities of public travel thereafter required it. The *Evans* case was cited and commented upon by the court in this case. On page 48 the court says in commenting upon the effect of encroaching upon a part only of the highway:

"It must be borne in mind that in the case at bar, the road was not *closed up* and the public thereby excluded from the use of the street."

In *McClelland v. Miller*, 28 O. S., 488, it was held that the enclosing by a hedge of a part of the untraveled portion of a public road, and the continuous and uninterrupted occupation of the enclosed portion thereof for twenty-one years, would not bar the public authorities to recover the enclosed portion of the public road.

In *Little Miami Railroad Company v. Commissioners*, 31 O. S., 338, it was held that the fact that a railroad company had erected abutments for its overhead crossing of a public road (as in the case at bar) within the limits of the highway but outside the traveled portion thereof, and had maintained them there continuously for a period of twenty-one years, was not a bar to an action of the county commissioners to compel their removal and recover possession of that portion of the public road upon which the abutments stood. It was there held that such structures, erected and maintained in the public highway, invaded rights both private and public and clearly constituted what in law is denominated a public nuisance. On page 349, the court in commenting on the *Evans* case, 5 O. S., says:

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"I am aware that it was held in *The City of Cincinnati v. Evans*, 5 O. S., 594, following the *Lessee of the City of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298, that the statute of limitations runs against a municipality as fully as against natural persons, and that the question of title by adverse use to a small margin of a public street was involved in that controversy. Notwithstanding this, the case can hardly be held to maintain the doctrine contended for by the plaintiff in error here. It was not there intended to sanction a doctrine so palpably at variance with the whole current of authority."

The doctrine contended for was that, although these abutments were obstructions, encroachments and nuisances in the public highway, nevertheless, by maintaining them therein for a period of twenty-one years the railroad company thereby acquired the right to forever maintain them there as against the county commissioners.

In *Heddleston, Supervisor, v. Hendicks*, 52 O. S., 460, it was held that the right of an adjacent land owner to enclose by a fence, however constructed, a portion of a public highway, can not be acquired by adverse possession, however long continued. This rule was applied to a township road and the court in deciding this case again referred to the *Evans* case, 5 Ohio State. The court says on page 465:

"The general rule is that the statute of limitations does not apply as a bar to the rights of the public, unless expressly named in the statute; for the reason that the same active vigilance can not be expected of it as is known to characterize that of private persons always jealous of his rights and prompt to repel any invasion of them. But in the case of *The City of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298, and of *The City of Cincinnati v. Evans*, 5 O. S., 594, a different rule was applied. * * * But these cases are regarded as exceptional; and confined to municipal corporations in cases where their possession has been disturbed by the erection of large and valuable structures under such circumstances as precluded the idea that the encroachment was simply permissive on the part of the municipality."

In the case of *Lane v. Kennedy*, 13 O. S., 42, the court on page 49 commenting on the *Evans* case, says:

"The decision might with equal, if not greater propriety, have been placed upon the ground of an estoppel *in pais* on the part of the city authorities; the building having been located by the

city *surveyor* and upon lines *previously established and built upon.*"

In the case of *L. S. & M. S. R. R. Co. v. Elyria*, 69 O. S., 414, the railroad company was required to remove its abutments from a public street of the municipality where they had been maintained for a period of thirteen years under a contract or agreement with the council of the municipality to erect and maintain them there. The court in deciding the case held that neither the grant from the municipality, nor the statute of limitations, could be invoked to enable the railroad company to maintain these obstructions in the highway. On page 435, the court says:

"As to the plea of the statute of limitations made in the answer, it is sufficient to say that it is the well settled law of this state that encroachments upon a public highway never ripen into a title by adverse possession, nor is such title plead in this case."

It is fair to assume that if it had been pleaded the court would not have sustained the plea in view of the above quoted language and the other authorities to the same effect. We do not think it necessary or instructive to cite authorities on this point other than the decisions of our own courts.

In some states it is held that the statute of limitations runs against all divisions of the state but not against the state; in other states—and we may say that this is the rule adhered to by a preponderance of the authorities—the statute of limitations does not run against the public whatever division of the state may be involved as to its property held in a governmental capacity.

In view of the holdings of our own courts with reference to encroachments on highways and public roads, the court is of the opinion that the reasonable and safe rule to adopt and that will eventually be adopted by our Supreme Court, is that no lapse of time will bar the public authorities in an action to recover the possession of lands belonging to a public highway or street, or to compel the removal therefrom of obstructions placed therein however long they may have been maintained and whether their character may be solid and permanent, or temporary and frail—and this rule will be applied to highways, streets or roads whether in municipalities, counties, townships or the state. There can be no distinction on principle between state roads, county

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or township roads and streets of a municipality, for in each and every case they are highways held by the public authorities as governmental agencies in their governmental capacity. The truth is that the ownership of all public highways is in the state, and it appears to be a departure from principle to hold that the statute of limitations applies to city streets or county roads and not to state roads. There is no more reason for exempting state roads from the operation of the statute of limitations than there is for exempting city streets and county roads therefrom.

Without pursuing the arguments further on this point, the court is of the opinion that the statute of limitations should not under the recent decisions in this state, be applied to bar the city, county or township from a recovery of a part of the highway claimed to be held by adverse title for a period of twenty-one years or more under a claim of ownership.

Furthermore, whatever might be the rule where the entire width of the roadway or street is occupied, thereby cutting off entirely the public use of the highway, the rule as to encroachments merely, so long as the public does not need the entire width of the highway for travel, is different from that laid down where the entire width of the highway is taken.

But it is contended in the case at bar that this turnpike road, inasmuch as it was owned and controlled by a private company—the Hamilton, Springfield & Carthage Turnpike Company—was not a public road or highway in the same sense as free county, township or state roads or streets in a municipality, until its abandonment in 1897, and that the rule applicable to public highways could not and should not be applied to this highway prior to 1897, and that defendant's right by adverse possession accrued long before that date, in fact in 1871 or 1872, twenty-one years after the abutments were erected.

Without commenting upon the following authorities, the court has come to the conclusion that so far as the public rights in toll turnpikes is involved, to keep the same open and free from nuisances, there is no distinction between such highways and free turnpikes, roads or streets. *Chagrin Falls Plank Road Co. v. Cane*, 2 O. S., 419; *Com'rs of Cuyahoga Co. v. State Plank Road*, 1 N. P. (N. S.), 143; *Commonwealth v. Wilkinson*, 33 Mass., 175; *Craig v. People*, 47 Ill., 487; *State v. Gravel Road Co.*, 138 Md.,

332; *Northern Central Ry. Co. v. Commonwealth*, 90 Pa. St., 300; *State v. Maine*, 27 Conn., 641.

Again, the charter of the defendant company, 44 O. L. L., 282, does not authorize it to use the highways or parts thereof in such a way as to interfere with the public use thereof; and now that the increased traffic on this highway, the construction of street car tracks therein, between the defendant's abutments and the public exigencies, require the use of the entire width of the roadway in the opinion of the county commissioners, it would seem strange that the defendant company, having erected these abutments without right or authority, should plead the continued existence of its own wrongdoing as a defense to the public demand that these nuisances be removed. The power and authority of any private corporation to do any act is to be determined by the grant of power contained in its character. It may be remembered that in the unreported case of *Village of St. Bernard v. B. & O. R. R. Co.*, the court of common pleas and the circuit court of this county held against the railroad company on its claim that it had acquired title to the land upon which a part of its abutments rested, by adverse possession for twenty-one years. This fact was admitted—that is that a part of the abutments had been in place continuously for twenty-one years prior to the commencement of the action to compel their removal, and this claim of title by adverse possession was squarely raised in that case.

The difference between that case and the one at bar is in the character of the highway. In the case of *St. Bernard v. B. & O. S. W. R. R. Co.*, there was no question but that the Carthage pike was a free turnpike or county road. But if toll turnpikes, as to the public's rights of travel and use therein and thereon, are on the same footing as free county roads and free turnpikes, as the court believes the authorities cited hold, then there is no reason why the rule applied in the case just cited—although it be an unreported case—should not be applied in the case at bar.

On the grounds that the statute of limitations does not apply to the plaintiffs in the case at bar under the facts of the case and that no lapse of time can legalize a public nuisance, such as are the obstructions in the highway of the character of these abutments, under the authorities cited, the court finds that these

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abutments and the embankments behind the same within the limits of this sixty foot roadway. can not be maintained as against the plaintiffs. and the defendant will be enjoined from maintaining the same and be required to remove them and restore the roadway to its former condition for the full width of sixty feet, within one year from the date of the decree to be entered herein.

The prayer of the petition is granted.

JURISDICTION OVER ACTS OF A TESTAMENTARY TRUSTEE.

Common Pleas Court of Licking County.

ALBERT A. STASEL, AS TESTAMENTARY TRUSTEE, v. LOUIS RIDER ET AL.

Decided, 1910.

Wills—Property Left to Testamentary Trustee—Instruction from Court as to Use of Principal for Support of the Ward.

Where a will vests in a testamentary trustee discretion in the employment of a portion of the principal in maintaining the *cestui que trust*, the trustee is an officer of the probate court in the administration of the trust, and the common pleas court is without jurisdiction in an original action to determine whether or not the welfare of the ward requires a sale of some portion of the property and the use of the proceeds, or whether the price offered for the property which it is proposed to sell is reasonable and proper.

A. A. Stasel and Charles L. Flory, for plaintiff.
Norpell & Norpell, for defendant.

NICHOLAS, J.

The plaintiff in his petition alleges the execution by Joseph Rider, deceased, of his last will and testament on March 10, 1894, the death of the testator March 17, 1901, the probating of said will in this county on March 25, 1901, the appointment of the executors thereunder, and upon the death of Benjamin Franklin, one of them, the appointment of his successor, Edward W. Crayton, the qualification of such executors, and later the removal as trustees of Louis H. Rider and Mary E. Zimmer-

man and the appointment of this plaintiff as such trustee in their stead, and he attaches a copy of the will of the said Joseph Rider to said petition. The petition then states the relationship of each of the defendants to the testator and his estate, and then alleges a certain contract entered into September 13, 1907, between all the heirs of said testator for the division of the Franklin county farm, and attaches a copy of said contract; that on February 17, 1906, said executors, Swartz and Crayton, while still acting as trustees, filed a certain petition in this court for construction of said will. That later in April, 1908, this court upon hearing rendered a final judgment and finding upon said will, by which said finding and order said executors and trustees were authorized to proceed to carry out said contract attached to said petition.

It is further alleged that the Franklin county land was then subdivided and platted, the plat duly approved by the proper authorities and filed with the recorder of Franklin county, and said farm was thereupon divided among said beneficiaries; a certain portion of the then agreed valuation of about twenty-three thousand dollars was held in trust for Louis H. Rider, and for Mary Zimmerman parcels of the value of between eighteen and nineteen thousand dollars; and that this property was afterwards turned over to this plaintiff as said trustee by said former trustees, and is now held by him in the trust relation provided for by testator's will.

It is then alleged that the rental value of these two tracts is about one hundred and twenty dollars each per year, upon which taxes are annually assessed to the amount of about forty-four dollars each; that these lots held in trust for Mary Zimmerman are the only assets belonging to said trust and the only sources of revenue for the benefit of said Mary Zimmerman, and that the income therefrom is wholly inadequate for her support, and that under the provisions of the will of said Joseph Rider said Mary Zimmerman is entitled to the income from said trust property for and during her life, and if said income is insufficient to keep her respectably is entitled to receive such portion of the principal in addition thereto as may be necessary for her comfortable support; that the lots held in trust for said Louis H. Rider comprised more than one-third in value of the entire

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trust estate held for his benefit, and said trust estate as now constituted is wholly inadequate for his support; that said Louis Rider is entitled by the will of his father to the income of said trust estate during his life, and if this income is insufficient to keep him respectably he is entitled to receive such portion of the principal in addition thereto as may be necessary for his comfortable support, and that the plaintiff therefore believes that the best interests of said trust will be subserved by the sale of the lots so allotted; that he has made a diligent effort to obtain offers for said trust property, and has been offered the sum of \$650 per acre, which would realize about \$14,000 for the trust estate of Louis H. Rider and about \$11,000 for the trust estate of Mary Zimmerman, and that he believes that these amounts are the best prices obtainable and all they are reasonably worth, and that he has entered into a contract to sell said trust property. And the plaintiff then asks the direction and judgment of the court in respect to all these matters set up in reference to his trust estate, and prays direction of the court as to the making of the sale already entered into by him, and as to the application of the proceeds thereof, and as to the regularity and sufficiency of his appointment as testamentary trustee, and of such other matters and things arising in the administration of said trust and the settlement thereof as may be necessary and proper.

The view I take of this case will not require an analysis of the defense urged, for the right of relief in the plaintiff, if any, must be found in his petition, and no cross-petition is interposed by any of the defendants. In his prayer the petitioner asks "the direction and judgment of the court in the matters and things therein set forth respecting said trust and the estate and property held by said plaintiff as trustee, and prays its judgment and direction as to the sale of that portion of the trust estate lying in Franklin county, and as to the regularity and sufficiency of the appointment of plaintiff as testamentary trustee, and the direction of the court in such other matters and things arising in the administration of his trust and in its settlement as may be necessary and proper."

All these questions submitted save one are moot questions, and that one is a request of this court at this time to review

the order of the probate court in the appointment of this plaintiff as testamentary trustee.

The will of Jacob Rider vests in this trustee as successor of the testamentary trustees a discretion in the employment of a portion, at least, of the principal in his hands to the income thereof for the maintenance of his *cestui que* trusts, and in the administration of that trust he is the officer of the probate court of this county, and to the jurisdiction of that court is entrusted the control of his handling of said trusts, and all matters concerning his administration thereof could come into this court only upon review proceedings of that court, and for this court to attempt in advance to decide whether or not it was necessary for the welfare of his wards to sell this property, or whether the price was a reasonable and proper one, would be an effort to forestall that tribunal and could be of no force or effect.

This court having only the power to review the findings of the probate court in matters of this character gives to this court no original jurisdiction, and consequently this case might just as well have been brought in the Supreme Court of Ohio as in the common pleas. This court, therefore, being without jurisdiction to consider these questions in an original action, it can only dismiss this petition at the cost of this plaintiff.

It might intimate, however, in passing that even the probate court could only entertain jurisdiction over the questions raised in this proceeding after the trustee had exercised the discretion vested in him by the will of the testator, but could not forestall his action by a prior proceeding. An action even in this court to construe the will of the testator would not aid the trustee in the questions presented by this petition. This last observation is *obiter* and I have added it to my finding in the case with the idea only that it might aid in understanding the view already expressed.

Exceptions will be allowed both plaintiff and defendants to this finding and order.

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Rawson v. Olds Motor Works.

**LIABILITY OF OWNER FOR INJURY BY JOY RIDING
CHAUFFEUR.**

Common Pleas Court of Cuyahoga County.

L. Q. RAWSON, AS ADMINISTRATOR OF THE ESTATE OF JERRY MAHONEY, DECEASED, v. THE OLDS MOTOR WORKS.

Decided, December 11, 1911.

Automobile—Negligence of Chauffeur Not Acting within Scope of His Employment—Owner Not Liable Therefor—Automobile Not a Dangerous Instrumentality—No Civil Protection to the Public from Irresponsible, Reckless, Joy-riding Chauffeurs.

1. The owner of an automobile is not liable in damages for the negligent acts of his chauffeur while the latter is acting beyond the scope of his employment.
2. Whether or not automobile is a dangerous agency, is a question of law, and not of fact.
3. The automobile is not to be classed with dynamite, nitro-glycerine and other dangerous instrumentalities, and is not, therefore, a dangerous agency within the meaning of the 47 O. S., 387, nor can such dangerous agency be inferred from the act regulating its use.

Seaton & Payne, for plaintiff.

Vernon H. Burke and *W. H. Boyd*, contra.

KEELER, J.

The propositions involved arise on a motion by defendant to direct a verdict.

The facts are these: on September 24th, 1908, one Jerry Mahoney, while passing along a public highway, was knocked down and killed by an automobile in the possession, as alleged, of the defendant, but which was then and there carelessly and negligently operated by defendant's servant.

The driver had been told by Mr. Booth, of the defendant company, to take the automobile *direct* to the Detroit boat for shipment, "and as soon as he could, so as to have it properly tagged and freighted." The boat was scheduled to leave at 10:45 P. M. The distance was about one mile, and could easily have been made in fifteen or twenty minutes. The point of destination

was due west, and the usual way was *via* the alley at the rear of the garage west to Eighteenth street, north to Euclid avenue, west to Ninth street, north to Superior avenue, west to the dock, with which route the driver was well acquainted. He left with the automobile just after the close of business, having over four hours in which to do the errand. He drove west through the alley to Eighteenth street, south to Prospect avenue, east to a restaurant, where he had his supper, and where he invited two waitresses to accompany him on a joy-ride. They proceeded east on Prospect avenue to get another girl, but not finding her, he turned his machine and went west on the same street to Eighteenth street, thence north to Euclid avenue, west on Euclid avenue, passing the garage from which he started, to Seventeenth street, north to Walnut avenue, where they stopped at a saloon and had a drink or drinks. From there the course was west to Ninth street, thence north, crossing Superior avenue, to St. Clair avenue. He was going east on St. Clair avenue at the time of the collision, his destination being Euclid Beach Park, some twelve miles east of the boat landing.

It will be observed that the driver or chauffeur changed his course not less than nine times, covering a distance of probably three miles. The extent of the deviation or *extra v'a* was great, marked and unusual.

What was the legal status of the parties growing out of the foregoing facts?

In support of the motion, it is claimed that at the time of the injury the driver was not acting within the scope of his employment, and hence the defendant can not be held liable.

It is a well-settled principle of law that for all acts done by a servant in obedience to the express requirements of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions, the servant alone is responsible.

It hardly seems necessary to cite authorities on this proposition; the books are full of them. Its fairness, its equity and its

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soundness must, on a moment's reflection, be conceded. But its application to automobiles, their owners and drivers has become so general and frequent that I deem it advisable to quote from a few of the leading authorities.

In *Railway v. Wetmore*, 19 O. S., 110, the Supreme Court of Ohio says:

"The master is not responsible for the wrongful act of his servant, unless that act be done in execution of the authority, express or implied, given by the master. Beyond the scope of his employment, the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged can not be regarded as the act of the master."

In *Lotz v. Hanlon*, 217 Pa. St., 339, the court say:

"In an action against the owner of an automobile for injuries caused by the running of the machine, it is essential to a recovery that it shall be made to appear that the accident occurred while the person in charge of the automobile was using it in the course of his employment and in his master's business."

In *Cunningham v. Castle*, 111 N. Y. Supp., 1057, the New York Supreme Court holds that:

"Where a chauffeur takes his master's automobile, and while using it for his own purposes and not in the scope of his employment, negligently runs into and injures a third person, the master is not liable for the injury, even though the master consented that the servant should use his automobile in the manner in which it did.

"Beyond the scope of his employment, the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged can not be regarded as the act of the master.

"If the act was done while the servant was at liberty from his service and pursuing his own ends exclusively, the master is not responsible, even though the injuries complained of could not have been committed without the facilities afforded by the servant's relations to his master." (Affirmed in 127 N. Y. App. Div., 580.)

In *Helby v. Smith*, 116 Mass., 265, the court holds:

"The owner of a motor car is not liable for an injury caused by the negligent driving of a person who is using the car for

his own benefit, and not in the business of the owner, nor in pursuance of the owner's instructions."

In *Morier v. St. Paul Railway Company*, 31 Minn., 351, the court say (using the same language found in 19 O. S., 110) :

"Beyond the scope of his employment, the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act in the doing of which he is guilty of negligence in the course of his employment. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by the authorities."

The case of *Steffen v. McNaughton*, 124 N. W., 1016, lays down the following doctrine:

"Under the contract of employment, the chauffeur was to care for and to operate the car during the day. The chauffeur boarded himself, and for his mid-day meal was allowed to go to his home about a mile distant. In making these trips he used the automobile, but without the owner's permission or knowledge, and on one of such trips the accident occurred, for which it was sought to hold the owner liable. The question was, whether the servant was acting within the scope of his employment at the time of the accident. It was contended on behalf of the plaintiff that the use of the automobile under the circumstances of the case raised the inference that the chauffeur had a permissive right to use it to facilitate his labor and service, that he thereby reduced the time for getting his meals, was thus able to devote more time to the service of his employer, and was acting within the privilege of his employment and in furtherance of his master's interests. The court rejected this contention, however, and held that the chauffeur was acting outside the scope of his employment, and that the master was not liable."

In *Patterson v. Kates*, 152 Fed., 481, the following doctrine was enunciated by the court:

"Defendant owned an automobile, which broke down while he was making a trip from Atlantic City to Philadelphia. He then left the auto in charge of the chauffeur, with instructions to repair and bring the machine on to Philadelphia. While waiting for a ferry at the Delaware river on his way to Philadelphia, the chauffeur consented to take a third person in the automobile

to a place about a mile back on the road, and while making such trip, through his negligence in driving too fast, he collided with a horse and buggy, which caused injury to the plaintiff.

"It was held that, under these facts, the defendant was not liable for the injury."

Shearman and Redfield on Negligence, Section 147:

"In determining whether a particular act is done in the course of the servant's employment, it is proper, first, to inquire whether the servant was at the time engaged in serving his master. If the act is done while the servant is at liberty from service and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master."

To the same effect are the decisions of the courts in the following cases: *Stewart v. Baruch*, 103 N. Y. App. Div., 577; *Clark v. Buckmobile Co.*, 94 N. Y. Sup., 771; *Maher v. Benedict*, 123 N. Y. App. Div., 57; *Higgins v. Western Union*, 156 N. Y., 75; *Perlstein v. American Exp. Co.*, 177 Mass., 530; *McCarthy v. Timmins*, 178 Mass., 378; *Doran v. Thomsen*, 66 Atl. Rep., 987 (74 N. J. L., 445); *Danforth v. Fisher*, 75 N. H., 111 (21 L. R. A. [N. S.], 93); *Reynolds v. Buck*, 103 N. W., 946 (Iowa); *Slater v. Advance Thresher Co.*, 97 Minn., 305; *Sullivan v. Morrice*, 109 Ill. App., 650; *Barmore v. Vicksburg Co.*, 85 Miss., 426; *Evans v. Dyke Auto Co.*, 121 Mo. App., 266; *Garretson v. Deunkel*, 50 Mo., 104; *Jones v. Hoge*, 92 Pac., 433.

The general proposition of law as to the relation of master and servant is not disputed here; but it is claimed by counsel for the plaintiff that it has no application to the case at bar, for the reason that the driver was at the time in the actual employ of the defendant, that is, that his time was under the control of and being paid for by the defendant. The error of this proposition is in its failure to keep in mind the distinction between an act done by the servant *within the scope* of his employment and an act done *during* his employment. Says Wood, in his work on the Law of Master and Servant, Section 286:

"If the act of the servant is not expressly ordered by the master, the master is not liable therefor, even though done in

the usual course of his employment. The question is, whether the act was expressly or impliedly authorized, in view of the employment, its character, the nature of the service required, the instructions given, and the circumstances under which the act was done. The simple test is, not whether the act was done while prosecuting the master's business, but whether it was done by the servant in furtherance thereof, and, further, such as may fairly be said to have been authorized by the master."

Upon this subject, says the 136 Fed. Rep., page 306:

"There is a marked distinction between an act done by the servant during his employment and an act done within the scope of his employment. To bind a master for an injury done by the servant, the servant must at the time be acting for the master within the scope of the duty assigned to him."

In view of the conceded facts in this case, I therefore dismiss this claim of the plaintiff.

It is claimed, further, that the automobile which the driver was then using, and with which he had been entrusted by the defendant, was a dangerous agency, thus bringing the case within the spirit and purpose of 47 O. S., 387, which holds as follows:

"The law requires of those who use dangerous agencies in the prosecution of their business to observe the greatest care in the custody and use of them. This duty can not be lifted by a master from himself to his servants, so as to exonerate him from the negligence of the servant in the use and custody of them. Where they are so entrusted, the proper custody, as well as the use of them, becomes a part of the servant's employment by the master, and his negligence in either regard is imputable to the master, in an action by one injured thereby. And where the injury results from the negligence of the servant in the custody of the instrument, it is immaterial, so far as the liability of the master is concerned, as to what use may have been made of it by the servant."

This is strong language, but its application here depends upon whether or not the automobile is to be construed as belonging to that class of agencies known as dynamite, nitro-glycerin and other dangerous instrumentalities. The attempt has been made in a number of instances to have it so classified by courts, but invariably, as I read the reports, it has failed. I have discovered a considerable diversity of opinion as to what is and what is

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not a dangerous instrumentality. Rules which were laid down in the earlier decisions have been modified to keep pace with the progress of science and invention; and the tendency of modern judicial opinion is to distinguish between those agencies which are inherently dangerous and those which become dangerous only when improperly used. If an automobile is such dangerous agency, then the defendant in this action would be liable for the negligent act of the driver, although at the time of the injury he was not in the prosecution of defendant's business. Explosives generally are classified as dangerous instrumentalities; but the question is not whether the automobile may become a dangerous agency in the hands of a negligent chauffeur or driver, but, rather, whether it is itself inherently dangerous. It has taken the place, to a very large extent, of the use of the horse as a mode of conveyance. It is used as a means of transportation, is recognized as lawful, and sanctioned by most of the states of the Union. While it may be, and frequently is, used in an unlawful, unsafe and dangerous manner, it nevertheless remains as a lawful means of conveyance, recognized as such by the courts and legislatures of the country. The driver of it is required to exercise care and skill commensurate with its use; and while the driver of a horse and carriage is not required to exercise as much skill and caution as the driver of an automobile, yet, nevertheless, he is required to use such skill and care as are commensurate with the safe operation of the conveyance operated by him. And while it is true that the courts require the automobile driver to use great diligence, yet they have not gone to the extent of holding that the automobile is in itself a dangerous agency. It is true that its operation is attended with some danger not common to ordinary vehicles, but it is not on that account to be judicially classed as a dangerous instrument within the well-understood meaning of that term.

On this subject it may be noted that twelve times as many people were killed by wagons as by automobiles in Chicago in 1905. These figures sound rather strange today, and I am inclined to believe that far more people have been killed in this country during the last year by the reckless driving of automobiles than by the careless use of dynamite or nitro-glycerin,

or possibly both combined. Statistics for the city of Cleveland for the first eleven months of the year 1911 show thirty-four deaths by automobiles, being about one to each 16,000 of population, and approximately three hundred injuries; and statistics for nine of the large cities in Cleveland's class show a mortality of two hundred and thirty-three. How many others were seriously injured throughout the country within that period is not now ascertainable, but three to four thousand would not be an extravagant guess. Of course it would be unfair to say, in the absence of knowledge, that all these deaths and injuries were caused by the negligence of the driver. They are impressive facts, however, and are suggestive of that rather drastic construction by some courts of which I will speak later. But it is the inherent danger of the agency that makes it dangerous. In and of itself, an automobile is an inoffensive, harmless machine. It becomes dangerous only when a dangerous driver is at the wheel.

The holdings of the courts before which this question has arisen, at this point become interesting and instructive.

In *Jones v. Hoge*, 47 Wash., 663, the court say:

"It is contended by respondent that an automobile is a machine of such danger as to render the owner thereof liable for injuries caused thereby while operated by his chauffeur, and even though not engaged directly in his line of employment, if the master has made it possible for the chauffeur to take out and operate such machine at pleasure; that the master is holden to employ only such chauffeurs as are competent and careful, and must be holden for damages occasioned by their incompetency and recklessness when making use of the machine, even though out of the line of employment, and also that in this case Barnes (chauffeur) was within the apparent scope of his authority.

"We do not think the contention can be upheld. Barnes was not using the machine to carry out any purpose for which he was employed. We do not think that an automobile can be placed in the same category as locomotives, gun powder, dynamite and similar dangerous machines and agencies. It is true that the operation of this machine is attended with some dangers not common to the use of the ordinary vehicle, and we believe and have already held that those who operate these machines must be held to that degree of care which is commensurate with the dangers naturally incident to their use (*Lampe v. Jacobson*,

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46 Wash., 536). But we do not believe that the law would charge the owner of an automobile with a liability for damages caused by the operator thereof under circumstances found here. In the case of *Robinson v. McNeill*, 18 Wash., 163, this court held that, where a section foreman who had charge of a hand-car, which he used to travel over the road, loaned the same to some boys, one of whom was injured thereby, the railroad company was not liable; as the foreman was not authorized to permit the hand-car to be used for such a purpose."

In the case of *Lampe v. Jacobson*, 46 Wash., 536, quoted in the foregoing decision, the Supreme Court of Washington, while not deciding that the automobile is a dangerous instrumentality, lays down the general principle of law relative to the care and caution required in the operation of an automobile, and I quote this for the purpose of showing how the Supreme Court of Washington in these two decisions has differentiated between the inherent dangers of an automobile and the dangers in its use and operation. The court uses the following language:

"The operation of an automobile upon the crowded streets of a city necessitates exceeding carefulness on the part of the driver. Moving quietly as it does, without the noise which accompanies the movements of a street car or other ordinary heavy vehicle, it is necessary that caution should be continuously exercised to avoid collisions with pedestrians unaware of its approach. The speed should be limited, warnings of approach given and skill and care in its management so exercised as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions."

In *Lewis v. Amorous*, 3 Ga. App., 50, the court say:

"It is insisted in the argument that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied.

"It is not the ferocity of the automobile that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. There are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limits of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil-disposed mules and the like."

In *Slater v. The Advance Thresher Company*, 97 Minn., 305, the court say:

"The rule of law applicable to the care and protection of dangerous instrumentalities does not apply. The rule requires the master to exercise a proper degree of care to guard, control and protect dangerous instrumentalities owned or operated by him, and, an injury occurring by reason of the improper use of such an instrumentality by a servant, though occasioned while not in the performance of his duty, the master is liable; but the principle on which liability is founded in such cases is the failure of the master to properly keep within his control such dangerous agencies."

In *Cunningham v. Castle*, 127 N. Y. App. Div., 580, the court say:

"It is urged that the automobile was a dangerous instrumentality, and that, having been entrusted to the chauffeur, the liability of the master still attached because of its dangerous character. The automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is no more dangerous *per se* than a team of horses and a carriage, or a gun, or a sailboat, or a motor launch. There is no evidence that the chauffeur was not competent and qualified to run the machine. If a game-keeper had borrowed his master's gun and had gone from the estate on a hunting expedition of his own, and had negligently shot a man, would the master be responsible because he was using that instrumentality which might be dangerous if carelessly used—a gun?"

In *Danforth v. Fisher*, 71 Atl. Rep., 535 (N. H.), the court say:

"Plaintiff's contention, that the owner of an automobile is liable to strangers in the same way and to the same extent he would be if it were a wild animal, has no force. There is nothing inherently dangerous about an automobile any more than about an axe. Both are likely to injure those who come in contact with them when they are used for the purpose for which they were intended, and both are harmless so long as no one attempts to use them."

There are several cases wherein the court has discussed the subject of the gasoline used for power and purposes in the automobile, and almost uniformly, by reason of the explosive character of gasoline, the courts have classified gasoline as a dangerous agency, the same as dynamite and other explosives, but in

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none of those cases has the court held that the automobile itself is a dangerous instrumentality.

I do not think, therefore, that an automobile can be judicially determined to be a dangerous agency in the sense that dynamite and other high explosives have been so determined. But its tremendous development within the last ten years, its high power and capacity for speed, and its great weight, have attracted and are attracting the attention of legislatures and courts throughout this country and in Canada.

In May, 1908, the Legislature of this state (99 O. L., 538) passed an act for the regulation, identification and registration of motor vehicles. It defines, among other things, the term "motor vehicle," the word "chauffeur," the word "owner," and provides for what records are to be kept by the Secretary of State at Columbus, the assignment of numbers, placards front and rear, the registration fee, for brakes and alarm devices, lights front and rear, speed, speed limits, duty when meeting horses, duty to stop in case of accident, regulations as to chauffeurs, their badges, etc., and penalties, penalty for displaying false placard, penalty for other than owner, arrest, bail, etc. And the act specifically provides that it shall be unlawful for any person to drive or cause to be driven any motor vehicle upon any public road or highway of the state in the absence of the owner without said owner's written consent.

It is urged that a fair interpretation of this act is to make the automobile a dangerous agency; that the people of the state, acting through the Legislature, have in effect so defined it.

The Province of Ontario, a few years ago, passed a law very much like our own, and the divisional court, interpreting the statute in a case quite similar to the one at bar, uses this language:

"I am inclined to hold that, having regard to the provisions of the act, as to the registration of the owner, the carrying of a number on the machine for the purpose of identification, and the permit granted on those conditions, as between the owner and the public, the chauffeur or driver is to be regarded as the *alter ego* of the proprietor, and that the owner is liable for the driver's negligence in all cases where the use of the vehicle is with the sanction or permission of the proprietor. In driving the motor

he is within the ostensible scope of his employment, and the liability will remain by virtue of the statute, and this even though the driver may be out on an errand of his own."

It was urged there, as here, that the chauffeur was not engaged in his employer's service, but was taking a joy-ride with some ladies, which was conceded.

The effect of this decision is, to wipe out entirely the old and well-established doctrine of master and servant so far as the automobile is concerned, and to place it in the category of dangerous agencies.

North Dakota has an act making the owner liable in damages, whoever the driver may be, while violating its provisions. So has Tennessee, making the machine liable, in part, for whatever judgment may be recovered, whether it be driven by the owner or any person in violation of the act. Likewise Kentucky and England.

A statute much like our own was passed by the state of New York in 1904, and one of her courts corresponding to our common pleas court has already determined "that the Legislature regarded automobiles as dangerous machines, and that their owners should be under special liabilities for the manner in which they are operated. No such restrictions have ever been imposed on other methods of transportation on highways. It is absurd to say that an automobile is no more dangerous than a team of horses. Fatal accidents have been of almost daily occurrence, and have come to be regarded in both city and country as a menace to people on the highway. The rapidity and stillness of their movements make them especially dangerous to pedestrians." 118 N. Y. Sup., 400.

This opinion, however, seems to be a direct contradiction of 127 App. Div., 580, previously rendered. Says that court:

"It may be that it would be wise and in the public interest that responsibility for an accident caused by an automobile should be fixed to the owner thereof, irrespective of the person driving it, but the law does not so provide."

I do not myself feel justified in taking so radical a view as the Ontario court, or as that of the 118 N. Y. Sup. I am dis-

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posed rather to accept the more conservative judicial opinion of the Appellate Division.

To hold that our Legislature has, in effect, determined that the automobile is a dangerous agency, is to push the judicial function into the field of legislation. If the Legislature had so intended, it seems to me it would have so stated in explicit words. If it desire so to do, that is certainly its privilege, subject to such attacks as may be made.

Incidentally, and apart from the case, I observe certain impressive facts standing out prominently from the investigation, if I am correct in this opinion. Under the statute and the decisions, the public has no civil protection whatever from the irresponsible, reckless, drunken, joy-riding chauffeur acting beyond the scope of his employment. Direct legislation on this subject would doubtless result in greater care in the selection of persons who are entrusted with these at least *quasi* dangerous agencies. That public sentiment, as voiced by a few of the courts and by many of our legislatures, is growing in this direction, is apparent. The legislatures of several states have already declared certain occupations dangerous, and fixed liability resulting from injury in them. Such legislation has, as a rule, so far been sustained on the ground that it has a reasonable relation to the public welfare. Whether the automobile can be so classed is quite another matter and has nothing to do with the questions raised here. Flowing from such legislation, however, it is easy to foresee a vast amount of litigation touching constitutional rights.

Motion granted.

**NECESSARY ALLEGATIONS IN A SUIT ON A CONTRACT
OF INDEMNITY.**

Common Pleas Court of Hamilton County.

THE CITY & SUBURBAN BELL TELEPHONE COMPANY v. THE
GREAT WESTERN MARBLE WORKS.

Decided, March, 1911.

*Pleading—All Averments Must be Made which are Pertinent to the
Issue—Conditions Precedent and Conditions Subsequent.*

In an action on a contract of indemnity which stipulates how notice of default shall be brought home to the defendant surety, averments should be made which will inform the defendant as to when the plaintiff first became aware of the liability of the defendant through the default of his principal and also the date when this information was communicated to the defendant by the plaintiff.

David H. Scott, for plaintiff.

Peck, Shaffer & Peck, contra.

WOODMANSEE, J.

The motion of defendant to require plaintiff to make its petition more definite and certain is granted.

When a petition filed on a contract alleges that all the conditions of the contract incumbent upon the plaintiff have been complied with, it meets the requirement of the code with reference to conditions precedent, but does not apply to conditions subsequent, which often form the basis for plaintiff's right of recovery.

The court is of the opinion that it is not exacting too much of a pleader to require him to set out any allegation pertinent to the issue that would really decide a whole case upon demurrer, rather than the point be raised at the hearing of the case when it comes up for trial. The speedy and orderly administration of justice would suggest the former procedure rather than the latter. Otherwise the pleader could withhold the allegation of a fact that would be fatal to his cause of action, and which he must know would be disclosed at the hearing; besides, if the particular fact were called to the attention of his client his

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affidavit to the pleading would indicate that the point in question was brought home to him, whereas, the general allegation in a pleading that all the conditions have been complied with does not mean much to the ordinary litigant who swears to the pleading.

A copy of the contract sued on in this action is attached to the petition and made a part of it. It is a contract of indemnity and it stipulates how a notice shall be brought home to the defendant to make it liable on the contract, and while the petition alleges that due notice was given to the defendant under the contract, the defendant is entitled to know the date when plaintiff first had knowledge of the fact that the defendant was responsible to the plaintiff because of the alleged default of defendant's principal and is also entitled to know the date when this information was communicated to the defendant.

Motion granted.

MONEY PAID TO WRONG PERSON BY BANK.

Common Pleas Court of Hamilton County.

JON CEREGUTI V. THE PEOPLES BANK & SAVINGS COMPANY.

Decided, June, 1911.

Banks and Banking—Question as to Negligence—Where Money Has Been Paid to Wrong Person—Should be Submitted to Jury—Unusual Care Required in Identifying a Depositor who Signs by "His Mark."

Where money on deposit has been paid by a bank to the wrong person, the question whether the bank is relieved from liability for the error on the ground that it exercised reasonable care is one for the jury.

Galvin & Bauer, for plaintiff.

Cohen & Mack, contra.

SWING, J.

This case is submitted to me upon a motion by defendant for a judgment in its favor notwithstanding the verdict of the jury in favor of the plaintiff. It was contended in argument by

counsel for the defendant company that the evidence showed clearly that the defendant company in paying out the money of the plaintiff on deposit, by mistake to another person, acted with reasonable care under all the circumstances and that the defendant company is therefore not liable and is entitled to a judgment in its favor. At the trial I submitted to the jury the question as to the exercise of reasonable care by the defendant company in the payment of the money. The jury returned a verdict for the plaintiff, and in an answer to special interrogatories found that the defendant had not exercised reasonable care.

The question is difficult. When I first learned the facts in the case, I was under the impression that the defendant company had acted with reasonable care, but after hearing all the evidence and carefully considering the case, I was of the opinion that the question of the exercise of reasonable care by the defendant was a proper question to submit to the jury. Upon further reflection, while I am still somewhat uncertain in mind about it, I am, upon the whole, still inclined to the opinion that it was a proper question for the jury, and the jury having found for the plaintiff upon the question, I do not feel warranted in entering a judgment for the defendant notwithstanding the verdict. I think it a question about which reasonable minds might differ, but that probably the finding of the jury is the more reasonable view, and the view more likely to be taken by impartial minds. This is the third trial of the case. In the second trial before my colleague, Judge Hunt, and a jury, the issue was presented to the jury as in this case. It is quite certain that the question will have to be finally determined by the higher courts and I am of opinion that so far as this question is concerned, it should proceed to such determination without further jury trial.

The motion for a judgment notwithstanding the verdict will therefore be overruled.

There is pending another motion for a new trial, which motion has not been argued to me, which I am informed by counsel for the defendant, it is his desire to present. That motion will be heard.

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In re Guy Major.

**POWER OF NOTARIES TO COMMIT UNDER A COMMISSION
ISSUED IN ANOTHER STATE.**

Probate Court of Lucas County.

IN RE GUY G. MAJOR.

Decided, October, 1911.

Notary Public—Authority to Take Depositions—Does Not Include Power to Punish for Contempt a Recusant Witness—When the Commission Under which He is Acting Comes from Another State—Distinction Between Causes Pending Without and Within the State—Construction of Statutes Relating to the Taking of Depositions.

A notary public duly appointed and qualified under the laws of the state of Ohio, has no authority to punish a witness for contempt in refusing to testify before him in the taking by such notary public of a deposition pursuant to a commission or dedimus issued to such notary public by a court of another state wherein the action in which such deposition is to be used is pending.

Brown, Hahn, Sanger & Froehlich, for petitioner.
S. T. G. Smith and Schunck & Thompson, contra.

O'DONNELL, J.

The agreed facts in this proceeding are substantially as follows:

Prior to August 7, 1911, there was pending in the circuit court of the city of St. Louis, Mo., the Eberson Paint Company, a corporation. vs the Guy G. Major Company, a corporation. The defendant is a resident of Ohio. Plaintiff desiring to take the deposition of certain witnesses in Ohio, caused notice of said taking to be given in Missouri in accordance with the statutes of that state service of which was had by posting a copy of the notice in the office of the clerk of the circuit court of the city of St. Louis, Mo. No notice of any kind was served in Ohio.

Thereafter, on August 4, 1911, there was duly issued from the office of the clerk of said circuit court a commission or dedimus as follows:

"The state of Missouri, to any judge, justice of the peace, or other judicial officer or notary public, of the state of Ohio, greeting:

"Know ye, that we, in confidence of your prudence and fidelity, do by these presents, authorize you to cause to come before you, to be examined as witnesses in a case pending in our circuit court, city of St. Louis, in the state of Missouri, wherein Eberson Paint Company is plaintiff and the Guy G. Major Company is defendant, all and every person, and at such time and place as shall be named to you for that purpose by the said plaintiff's attorney or agent, and we command you to examine all and every such person, upon his oath or solemn affirmation first made or taken before you, to testify the whole truth touching his knowledge of anything relating to the said matter in controversy between the said parties; and that you do take such, his examination, and reduce the same into writing. When you shall have so taken his examination, you are to cause the witness to sign the same; and to that and each examination, at the foot thereof, you are to append your certificate, setting forth the facts that the examination was subscribed and sworn to, or affirmed, by the witness, and the day, as well as between what hours of the day it was done, as also the place of residence of the witness, if known to you. Should any paper or exhibit be procured or proven, or referred to by the witness, you are to describe the same in his examination, or cause it to be so marked by him as to establish its identity, and attach the same to his examination. The examination thus taken you will cause to be accompanied by a certificate of your official character, tested by the seal of the state; or, should it be more convenient, such authentication and proof of your official character may be made by the certificate and seal of the clerk of any court of record of any county of the state, district or territory in which you reside; stating, also in addition to the fact of his being clerk, that the court is one of record, that at the time when the depositions were taken, you were an acting judge (or other such officer to whom this commission is addressed) and duly commissioned as such. And you will return the same and all exhibits produced to you, annexed hereto, carefully closed up and under your seal, directed to the clerk of the circuit court, city of St. Louis, Missouri, with the names of the said parties litigant endorsed thereon, with all convenient speed.

"Witness, Chas. R. Graves, clerk of said court, with the seal thereof hereto affixed, at office in the city of St. Louis, this — August, 1911.

"CHARLES R. GRAVES,

[SEAL.]

"Clerk Circuit Court, City of St. Louis."

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This dedimus, or commission, came to the hands of Louis B. Hall, a notary public of Lucas county, Ohio, who on August 5, 1911, issued a subpoena to Guy G. Major, which subpoena is as follows:

“THE STATE OF OHIO, LUCAS COUNTY, SS.

“To Guy G. Major.

“You are hereby commanded to be and appear before me, a notary public, of the state of Ohio, in and for said county, at my office, 1226 Nicholas Building, in the city of Toledo, on the 7th day of August, A. D. 1911, at 9 o'clock A. M., then and there to be examined and the truth to speak in behalf of the plaintiff, in a certain action pending in the circuit court of the city of St. Louis, in the state of Missouri, wherein Ebersson Paint Company, a corporation, is plaintiff, and Guy G. Major Company, a corporation, is defendant. Hereof fail not under penalty of the law.

“Given under my hand, this 5th day of August, A. D. 1911.

[SEAL.]

“LOUIS B. HALL,

“Notary Public, Lucas County, Ohio.”

On the back of said subpoena was the following endorsement:

“THE STATE OF OHIO, LUCAS COUNTY, SS.

“W. E. Brannon being first duly sworn, says that on the 5th day of August, 1911, he served the within subpoena on Guy G. Major in Lucas county, by delivering a copy of said subpoena to him personally.

“W. E. BRANNON.

“Sworn to before me and subscribed in my presence this 7th day of August, 1911.

[SEAL.]

“ORION C. CLEMENT,

“Notary Public, Lucas County, Ohio.”

On August 7, 1911, said Guy G. Major failed to appear in pursuance to said subpoena, and on said date Louis B. Hall issued a writ to the sheriff of Lucas county, Ohio, commanding him to attach said Major and to have his body before said Hall at his office on August 9, 1911. The taking of said deposition was regularly adjourned by the notary until August 9, 1911; the sheriff duly attached the body of said Major and did produce him before said notary on August 9, 1911; at that time said Major was ordered to be sworn by said Hall and refused to be sworn; thereupon the attorney for the plaintiff propounded certain

competent and material questions to the said Major, which he refused to answer. Whereupon said Hall, the notary, made an order that said Major be imprisoned in the county jail of Lucas county, Ohio, until he submit to be sworn as a witness as ordered by said notary; and that he be imprisoned in the county jail until he submit to testify in said cause in pursuance of said order. The sheriff took the said Major into his custody.

Whereupon said Major filed a petition in habeas corpus in this court. It is claimed by said Major that said Hall as notary public or commissioner had no power to punish for contempt when engaged in taking a deposition in a cause pending out of this state. On the other hand, it is contended that a notary public possesses the same power in taking depositions in causes pending outside the state as in causes pending in the state.

It may be conceded that in the absence of power expressly conferred by statute, a notary public, when sitting as an examiner in taking depositions, has no power to punish for contempt one who disobeys the subpoena, or if present, refuses to be sworn and answer material and pertinent questions, but the court wherein the cause is pending has jurisdiction to punish for the contempt. That a notary public, taking depositions in a cause pending in Ohio, and under and by virtue of the laws of Ohio, has power to punish for contempt is settled. *Archibald v. DeCamp*, 50 O. S., 618.

Does a notary public possess the same power to punish for contempt when taking a deposition in a cause pending in another state and by virtue of a dedimus or commission issued by the court in that state? In determining this question, an examination of the statutes of this state relative to the power conferred on notary publics when taking depositions is necessary.

Section 126 of the General Code of Ohio, 1910, provides:

"A notary public shall have power within the county or counties for which he is appointed to take and certify deposition. * * * In taking the deposition he shall have the power which is by law vested in justices of the peace to compel the attendance of witnesses and punish them for refusal to testify."

Section 122: "Each notary shall hold *his office* for the term of three years."

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This section also provided for bond and his taking an oath.

Section 11502 reads as follows: "When the attendance of a witness before an officer authorized to take the depositions is required the subpoena shall be issued by such officer."

Section 11510. "Disobedience of a subpoena, a refusal to be sworn, except upon failure to pay fees duly demanded and an unlawful refusal to answer as a witness, or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required."

Section 11511. "When a witness fails to obey a subpoena personally served, the court or officer before whom his attendance is required may issue to the sheriff, coroner, or a constable of the county an attachment commanding him to arrest and bring the person named therein before said court or officer at the time and place the writ fixes to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety for his appearance, which sum shall be endorsed, on the back of the writ, except that, if no sum be so endorsed, it shall be \$100.00. When the witness was not personally served the court by a rule, may order him to show cause why an attachment should not issue against him."

Section 11512. "Punishment for the acts of contempt specified in Section 11510 shall be as follows: When the witness fails to attend in obedience to a subpoena, the court or officer may fine him not over \$50.00; in other cases, not more than \$50.00 nor less than \$5.00; or he may imprison him in the county jail there to remain until he submits to be sworn, testifies or gives his deposition."

Section 11528. "Depositions also may be taken when the testimony is required in an action, cause, or matter pending before any court or authority without this state."

Section 11530. "Depositions taken in and to be used in this state must be taken by an officer or person whose authority is derived within the state, but, if for use elsewhere, they may be taken before a commissioner or officer who derives his authority from the state, district or territory in which they are to be used."

The above statutes enumerate cases wherein a notary public may commit for contempt and that power can not be exercised in

a case not specifically enumerated therein. Whatever the Legislature may have intended, such intention can have no effect unless expressed in the statute, for this being a statute of a penal nature can not be extended by inference or implication, for the Legislature can not be presumed to have intended to confer greater authority than that specifically granted. In construing statutes, penal in their nature, the Legislature is presumed to have intended to keep within the territorial limits of its jurisdiction. Such laws are not to have an extra-territorial operation.

"*Prima facie*, every statute is confined in its operation to the persons, property, rights or contracts which are within the territorial jurisdiction of the Legislature which enacted it. The presumption is always against any intention to attempt to give to the act an extraterritorial effect." *Black on Interpretation of Laws* (2d Ed.), page 107.

Section 11530 of the General Code of Ohio provides:

"Depositions taken in and to be used in this state must be taken before an officer or person whose authority is derived within the state; but if for use elsewhere they may be taken before a commissioner or officer who derives his authority from the state, district or territory in which they are to be used."

The above statute simply permits the taking of depositions for use outside of Ohio, by a commissioner or officer who derives his authority from the state in which they are to be used, but does not clothe the officer with the same powers expressly conferred when taking depositions to be used in this state.

Section 11528 provided:

"Depositions also may be taken when the testimony is required in an action, cause or matter pending before any court of authority without this state."

These are the only statutes in Ohio providing for the taking of depositions in a case pending in a foreign court. As was said in *Bushnell et al*, 44 N. Y. Sup., 258:

"The Legislature was under no obligation, except perhaps the obligation of comity, to fix any punishment for a refusal to testify under a commission from another state."

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Inasmuch as there is express provision in regard to the taking of depositions for use in Ohio, to the effect that a witness may be committed for contempt for failing when regularly summoned, to appear and testify, it is contended that the same power is given in taking depositions by virtue of a commission or dedimus issued from a foreign court. Can this power be implied?

The fact that it exists by express statute only in taking a deposition in a case pending in Ohio, is an argument against its existence by implication in taking depositions for use in a foreign state; for there is no reason why it should be expressly given in the one case and left to implication in the other, if in both cases it was intended that it should exist. It is true, as a general rule, that a power which is expressly granted, carries with it by implication all the incidental powers which are necessary to render it effectual. The rule, however, is not to be enforced without due regard to other legislative rules and principles. It is going far to hold that a statute permitting the taking of deposition carries with it, by implication, a power to fine or imprison for contempt. Such a power is a power to punish. In a great many of our statutes, express statutory power is given to a notary to take depositions and to punish for contempt a person refusing to obey a subpoena or testify, and by express statute the same powers are made applicable in taking depositions, intended for use in the courts without their respective states, but I do not find that this power has been held to exist in taking depositions for use outside of the state, by implication, except in New Hampshire. The New Hampshire cases are against the great weight of authority. But I am of the opinion that Mr. Hall, in ordering the commitment which is under consideration in this case, derived the sole and only authority which he had in the premises from the dedimus or commission issued and sent to him by the Missouri court.

In *Cash Register Company v. Heyne*, 10 N.P.(N.S.), 465, 488, in referring to an Ohio notary public who was taking a deposition for use in the state of Michigan, the court say:

“The basic authority if any, which Jones has for taking the depositions to be used in the Michigan case, must necessarily come from the laws of that state, which are now before us. When tak-

ing testimony here to be used there, he does so because permitted by the law of that state to act for that purpose."

After quoting Section 11528 of the General Code, the court further says:

"In passing this section of the General Code, the Legislature acted within the rule of comity. The section is an aid to the courts of sister or foreign states. It yields as a favor, what can not be claimed as a right, but what it is within the Legislature to permit."

In the case of *Goodman*, 7 N. P., 201, where the Surrogate Court of New York issued a commission to William F. Fox, of Cincinnati, Ohio, authorizing the said Fox to examine witnesses in Ohio, to certify the depositions as directed to the court issuing the same, and said Fox in pursuance of said commission issued subpoenas to certain witnesses requiring them to appear before him for the purpose of giving their testimony, the petitioner refused to obey the subpoena and refused to be sworn, the commissioner ordered and adjudged that he be imprisoned in the county jail until petitioner would submit to be sworn; whereupon the petitioner filed a petition in habeas corpus in the common pleas court and was discharged. In deciding that case, Judge Saylor says:

"In this case the commissioner derived his authority from the state of New York under the laws of New York and by Section 5269 (old number) his authority to take a deposition in this state is recognized. But I do not think it was the intention of the Legislature to thereby vest in him, as an officer, authority to punish a witness for contempt by imprisonment." *Ibid*, 208.

In New York it has been held that a notary public of that state when engaged in taking depositions by virtue of a commission issued and directed to him from a court of a sister state, has no power to punish for contempt, a witness who refuses to appear and testify when directed by said notary. The ruling is based on the fact that the notary derived his authority from the court of a foreign state and not from the laws of New York. *People v. Leubischer*, 51 N. Y. S., 735; affirmed in 54 N. Y. S., 869; 34 App. Div., 577.

In deciding this case the court of appeals say :

“The commissioner derived no authority and does not exercise any judicial function under the laws of the state of New York. He is not connected in any way with the administration of justice in this state. The process that he has issued is to enforce an order of the court of the state of Colorado, directing him to take the evidence of this relator and transmit it to such foreign court for the purpose of the trial of that action in such court. His power to act is derived entirely from the appointment of the court of another state. The action in which he assumes to act is pending before the court of another state. * * * We come then to the question as to whether or not authority given to an individual who is not connected with the administration of justice in this state, who has no judicial power vested in him by either the Constitution or the Legislature, not connected in any way with any of the courts in whom the judicial power is vested, can be authorized by the Legislature to issue a process, which shall be a process of law by which an individual may be deprived of his liberty or his property. It can hardly be claimed that ‘this commissioner and notary public’ is connected with the judicial department of the government of this state. He does not act by virtue of his holding the office of notary public within this state. The addition of that title to his name is merely *descriptio personae*. He is not appointed by any state authority, but is appointed by the court of a foreign state. He may well be a citizen of a foreign state, owing it his allegiance. The proceeding in which this committment was granted was not one originated or pending in the courts of this state. It was begun in a district court in the state of Colorado; that portion of it, which is to be performed in this state was originated by an order of that court, is pending under the direction of that court, and may be brought to an end at any time when that court sees fit to do so. * * * The person before whom it is conducted, although he happens to be a notary public of this state, gets no power to act from any of the constituted authorities of this state.”

After the above decisions, the Legislature of New York enacted new statutes, designed to meet the objections set forth in the decisions referred to. The *dedimus* or commission in the present case is issued out of the circuit court of the state of Missouri, directed to a notary public in Ohio, authorizing him to perform certain acts; in other words, it is a command of the Missouri

court to do certain acts and return the commission or dedimus to the court issuing the same.

The fact that the notary's name is omitted in the commission or dedimus is, in my opinion, of no great consequence. In either case, the power to act comes from the Missouri court. Mr. Hall, as notary of Ohio, in assuming to take the deposition as commanded by the commission or dedimus, was not complying with the law or rules of practice governing the taking of depositions to be used in this state. He was complying with the command emanating from the court of Missouri and permitted by the statute of Ohio, providing the witness would appear and give his testimony, but with no power to punish for contempt a recusant witness.

It may be said that if a notary of this state can not punish for contempt in taking a deposition in a cause pending in a foreign state, justice may be impeded, unless the witness is willing to testify.

The furtherance of justice demands the compulsory attendance and testimony of recusant witnesses residing in this state, whenever needed to be used in causes pending in sister states. If at the present time this power is not mandatory, but permissible only, it is the duty of the Legislature of our state to supply the necessary legislation. However it is well to safe-guard the taking of depositions, as the power may be diverted from its legislative purpose to a purpose of discovery or the pursuit of inquisitorial investigations or other abuses. The Legislature perhaps did not overlook its liability to such an abuse and may, for that reason, have left it in the power of the person to protect himself by refusing to testify.

In view of the law as I find it declared in the cases which have been decided, and in view of the legislation of other states as well as our own, I have come to the conclusion that a notary public of this state in taking depositions by virtue of a dedimus or commission issued by a court of another state and in which the original case is pending has no power to commit a recusant witness for contempt.

I have not reached this conclusion without some hesitation, but at the same time with the clear conviction, that if the power is

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to exist, it is far better that it should exist by express legislative authority, with proper safe-guards against its abuse, than that it should exist by implication and without them.

The petitioner is discharged and an entry may be prepared accordingly.

LIABILITY FOR LOSS OF PROBATE COURT FUNDS.

Common Pleas Court of Hamilton County.

STATE OF OHIO, EX REL STANLEY STRUBLE ET AL., V. HOWARD
FERRIS ET AL.

Decided, December, 1911.

*Office and Officer—Probate Court Funds Lost Through Bank Failure—
Liability of the Judge Holding Office at the Time and of His Suc-
cessors Therefor—Voluntary Assumption of Fictitious Account—
Statute of Limitations Not Applicable, When—Section 11226.*

The Commercial Bank of Cincinnati failed in 1895 having therein on deposit a large sum of money deposited by the probate judge of Hamilton county. Through the payment of dividends from time to time this became reduced in amount until on final distribution a balance of \$634.61 remained unpaid. This shortage was carried by the judge holding office in 1895 and those who have succeeded him as a cash asset on the books of the court. The present action was brought to recover the amount of the final shortage, and the several judges were made defendants. *Held:*

1. Such an action is subject to the ten years statute of limitations; and the incumbent in 1895 having been re-elected in 1897 and again in 1900, his incumbency continuing until 1902, the right of action was carried forward to that date and is not barred by the statute.
2. Succeeding judges having voluntarily assumed the fictitious account they are also liable on their official bonds for the amount thereof.

O'CONNELL, J.

This is an action brought by the commissioners of Hamilton county, Ohio, against Howard Ferris, Kate B. Nippert and Charles F. Malsbary.

The petition recites that Howard Ferris, Carl L. Nippert and C. F. Malsbary were probate judges of Hamilton county, Ohio.

It names the terms during which each held office and says that each duly gave bond in accordance with Section 529 of the Revised Statutes of Ohio for each of their respective terms. Each bond stipulates among other things: "Now if the said — shall faithfully pay over all money received in his official capacity * * * then this obligation shall be void." The petition then alleges that the said Ferris did not faithfully pay over all money coming into his hands as probate judge to the extent of \$634.61. This amount was part of a large sum deposited in the Commercial Bank of Cincinnati, which failed and went into liquidation, and failed to pay over said amount to said Ferris or his successors. The sum on deposit in the Commercial Bank at and after the time of its failure was carried on the books of the probate court as "cash in bank." When the term of Ferris expired, his successor, Nippert, accepted it as such and carried it as a cash asset. When Nippert died his successor, Malsbary, accepted it as such and carried it as a cash asset.

The petition alleges further that owing to the method of keeping the books of accounts of the probate court the said variance from actual cash on hand was not discovered until disclosed by an examination made by the state authorities in 1907. The petition alleges further that none of the defendants have paid over to Hamilton county the said sum or any part thereof and that the defendants are jointly and severally liable for the same.

The answer of Howard Ferris admits his incumbency of the office of probate judge and the giving of bond, but by way of a first defense enters a general denial. By way of a second defense he pleads the statute of limitations, which he avers is six years.

The answer of Charles F. Malsbary admits his incumbency of the office of probate judge from the 19th day of September, 1904, to the 9th day of February, 1909, and admits that when he took charge of the probate court as the judge thereof, there was a shortage on the books of said court of \$634.61 on account of the failure and liquidation of the Commercial Bank, as alleged in the petition, but he alleges that this sum had been paid and that on the 16th day of November, 1906, Kate B. Nippert, as ex-

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ecutrix of Carl L. Nippert, voluntarily paid to him as said probate judge the full amount of said shortage, and that as such probate judge he gave her as executrix a good and valid and full receipt for the same, and that the said books of account of said court have been ever since in balance on account of the payment of said shortage, all of which is shown by the accounts kept in the books of said probate court.

Kate B. Nippert answers individually and as administratrix of the estate of Carl L. Nippert. She admits the deposit of the funds in the Commercial Bank and the shortage of the county funds in the amount set out in the petition, which said sum had been carried as a cash asset. By way of special defense she says that individually and not as administratrix of the estate of her husband, on or about the 16th day of November, 1906, acting under a mistake both of law and of fact, she paid said sum to the then probate judge, Malsbary. Thereafter, when apprised of the real facts in regard to the alleged shortage she applied to the commissioners of Hamilton county, who set aside the said sum as a separate fund in the country treasury in her name. She denies further any liability on the part of any of the probate judges.

It is the contention of the defendants as disclosed in their briefs that the defendants are not liable because, first, of the statute of limitations, and secondly, irrespective of the statute, because there is no liability on the part of defendants, due care having been exercised on the part of the defendant Ferris in selecting a bank, and the loss of the money having occurred through no overt act of any defendant, but by reason of facts beyond their control.

It is their contention further that the liability accrued at the time of the failure of the Commercial Bank, or in any event, prior to 1902, when Judge Ferris ceased to be probate judge.

Conceding that the bank failed in 1895 as stated in their briefs, and that the terms of Judge Ferris thereafter expired respectively in 1897, in 1900 and 1902, it is difficult to see how he could avoid liability simply because one term of office expired and another began.

It must be remembered that these actions are not against the bondsmen, but against the officials themselves. The county has a right, if it sees fit, to disregard the sureties and seek to hold the principals on the bonds. Regardless of what might be concealed from his bondsmen, the judge himself had knowledge of the status of affairs, and as by our statutes the probate judge is also ex-officio his own clerk, he was at liberty to carry his funds and balances in any manner of his own selection. Although the Commercial Bank had failed and the outcome was problematical, and although he could not withdraw them or draw on them as a deposit for a single penny, he chose to carry on his books and report to the county commissioners periodically that the funds he had deposited there were "cash in bank" or a cash asset. Although theoretically each of his terms was an entity in itself, yet practically and in the eyes of the law there was no severance of his relationship to the probate court and of his control over its books and its funds until his connection with the court ceased in 1902, and Carl L. Nippert became probate judge. Therefore, the cause of action as against him did not accrue until 1902, when on leaving office he failed to turn over to his successor "all moneys received in his official capacity."

It has been repeatedly held in Ohio and elsewhere that a public officer can not escape a statutory liability through theft, the failure of a bank, or other circumstances beyond his control. When through his official bond he contracts "to faithfully pay over all moneys received in his official capacity," he makes a binding contract permitting of no exceptions not strictly provided for in the bond itself. The bond being plain and unambiguous in its terms should be treated as any other written contract.

The rule is otherwise where the officer is not so bound by the terms of his bond, and in many states where there is no statutory provision, the common law requirements of "due care" is all that is demanded of the official, but such is not the law in Ohio.

But his counsel contend that the action is barred by the statute of limitations, which they assert is the limit of six years. This contention is hardly tenable. Section 11226 of the General Code provides:

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“An action on the official bond or undertaking of an officer, assignee, trustee, executor, administrator or guardian, or on a bond or undertaking given in pursuance of statute shall be brought within ten years after the cause thereof accrued.”

The petition on its face clearly shows that the action is against the probate judges on their bonds. It is not an action for a failure to pay over money had and received. It is an action on official bonds, hence is subject only to the provisions of Section 11226. The limitation is ten years and not six years. The plea of the statute of limitations is therefore unavailing, the petition having been filed in 1909. As the terms of office of Judges Nippert and Malsbary succeeded that of Judge Ferris, it necessarily follows that the plea of the statute as to them is likewise unavailing.

The further question, however, presents itself regarding them, as to what extent, if any, they are liable in having accepted the statement of the account in the Commercial Bank in lieu of the cash itself. No question of fraud or mistake has been pleaded on their behalf. For the purposes of this case it must be held that they were fully cognizant of the status of affairs and each acquiesced in the situation as he found it. In the first place, then, each assumed the responsibility of this being a cash asset, otherwise each would have repudiated it, having knowledge that there was a deficit between the amount of cash actually in the possession of the court and what purported to be cash on hand. After a voluntary assumption of the fictitious account, can they now be heard to say that they did not receive the money; that the account being fictitious and that not having received the money, they are not liable for its loss? If they accept such alternative are they not still liable under their bonds wherein they obligated themselves to faithfully discharge the duties of their office, when they voluntarily carried a fictitious account, the money not being in the possession, custody, or even under the control of the court, there being in fact a deficit? If Judge Nippert accepted from his predecessor, Judge Ferris, as cash a doubtful asset in process of liquidation and carried that item on his books as cash, making periodical reports of such as cash to

the county commissioners at the periods required by law, and if, as a matter of fact, it was not on hand, then he is liable under his bond for the deficiency. Similarly if Judge Malsbary accepted the accounts of Judge Nippert as being correct and carried on his books as cash an item which was not in existence and cash which he did not have, periodically reporting this item as cash to the county commissioners when as a matter of fact he did not have such cash on hand, then he is liable under his bond for the deficiency.

The county commissioners in this petition have sued two judges and the administratrix of the other who died during his term of office, alleging that they are jointly and severally liable.

The court finds that the petition states a good cause of action against each defendant. The court further finds that the defenses as pleaded and elaborated in the briefs of counsel are not good in law save only, of course, the pleas of the general denial and of payment.

Mrs. Kate B. Nippert, widow of Carl L. Nippert, answering as an individual, says that acting as an individual and not as administratrix of her husband's estate, and acting under a mistake both of law and of fact, she paid the sum of \$634.61 to Hamilton county. If this be true, she should be relieved and the money refunded. And her answer avers a willingness on the part of the county commissioners to make such restitution under certain contingencies. This answer, however, can not be passed on as a question of law, for taken in connection with the answer of Judge Malsbary, both raise such questions of fact as are only capable of adjustment by a jury.

The petition prays for a money judgment in the sum of \$634.61. Such cause on the issues remaining under the several answers is one for submission to a jury, a jury not having been waived. It is therefore ordered that this cause be sent to a jury room for submission to a jury on the questions of fact involved.

**RIGHTS UNDER A CONTRACT OF PURCHASE MADE
BY AGENT.**

Common Pleas Court of Muskingum County.

TOPPER BROS. v. F. BOHN ET AL.

Decided, January Term, 1911.

Agency—Constructive Trust Under Contract of Purchase Entered Into by Agent—Vendors Proper Parties to Action by Principal for Carrying out of Agreement—Injunction—County Property May be Sold by County Commissioners at Private Sale.

1. Where one acts as agent to make a certain purchase at an agreed compensation, and after effecting the purchase refuses to recognize the interest of his principal in the contract, a constructive trust is created in the property in favor of the principal.
2. In such a case the persons with whom the agent has negotiated for the property and to whom he has paid a part of the purchase price are proper parties to an action by the principal for a completion of the contract and a recognition of his rights therein; and upon tender of the amount remaining due under the contract he is entitled to an injunction against transfer of the property to the agent and decree for its transfer to him.

*C. D. Saviers and Charles Lemert, for plaintiff.
Ribble & Pugh, contra.*

FRAZIER, J.

The questions to be decided in this case arise upon a motion to dissolve a temporary injunction heretofore allowed, which motion is presented by the defendant, Bohn; also upon a demurrer to the petition presented by the county commissioners.

Both the demurrer and the motion to dissolve admit the truth of the allegations of the petition that are well pleaded, i. e., for the purposes of this case, but that the facts stated in the petition do not warrant the relief prayed for, by way of an injunction, nor entitle the plaintiff to the remedy against the county. I need not repeat the allegations of this petition. Counsel are familiar with them.

Counsel for Bohn & Kern urge that the remedy at law is adequate and that there is no place here for a temporary injunction. They assert that a recovery by way of damages would be adequate.

The prosecuting attorney, representing the county commissioners, urges that no cause of action is stated in this petition against the commissioners.

Now what is the theory of this action? I think there is some misconception about it. I conceive the theory of this action to be an action to enforce a constructive trust. By the terms and allegations of the petition, an agent was employed to purchase certain property for his principal, and has taken a contract in his own name and acquired property rights thereunder, and the principal is now here seeking to have this contract and the rights thereunder transferred to it.

As I have said, this is an action to establish a constructive trust growing out of a fiduciary relationship (and the relation of principal and agent is always a fiduciary one).

The prayer of this petition may have misled counsel, and I will read the substance of it. First, the prayer is that a restraining order be allowed against the defendants, Bohn & Kern, from transferring any rights under this contract or from selling or transferring the contract itself, and that the plaintiff, on final hearing, may be deemed to be the true owner of the contract for the purchase of the superstructure aforesaid, and that the county commissioners of Muskingum county, Ohio, may be ordered and directed to correct their records so as to show the true facts, and be ordered and directed to enter into a written contract with this plaintiff, etc. There is also a prayer that the plaintiff be awarded damages in the sum of \$2,000.

Assuming that the allegations of this petition that are well pleaded are true, Bohn was agent of the plaintiff, authorized by the plaintiff to enter into a contract not to exceed a certain sum, for the purchase of this superstructure, and the allegations of the petition are that Bohn, in violation of his relationship and the duties thereby imposed upon him, took this contract to himself.

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Upon that state of facts, without anything else being shown, I think the law, under the authorities, clearly raises what is termed a constructive trust, independent of any question of fraud.

The first view I had about this case was that the sale of this superstructure, under our statutes, was illegal, for the reason that the county commissioners had not proceeded in a proper way, but it seems, after an examination of the statutes, that the court was wrong as to that theory. The prosecuting attorney has said to the court here in his argument, that there is no statute preventing the sale by the county commissioners, at private sale, of property owned by the county. I have no doubt that is true. Counsel for the plaintiff have stated that there seems to be no statute governing the sale of county property, property owned by the county, by the commissioners, at private sale. As I have said, the authorities are clear that, under the circumstances, a constructive trust arises.

In 1 A. & E. Ency., 1st Ed., p. 378:

“An agent with power to buy may not purchase for himself. A purchase by an agent in his own name in matters within the purpose of his agency, creates a constructive trust for his principal.”

As I have said, the allegations of this petition are that Bohn was the agent of the plaintiff in this matter, and his compensation had been agreed upon, and the things that he was to do are set out in this petition. Again, in 1 A. & E. Ency., 2d Ed., p. 1062:

“An agent to purchase will not be allowed, without the intelligent assent of the principal, to purchase for himself and hold property in his own name, unless he has openly and notoriously discharged himself from his agency, and a purchase in his own name will be regarded as made on behalf of his principal, for whom he will be considered a trustee.” And a great many other authorities are cited.

In 31 Cyc., cited in the argument this morning, the following is found:

“Likewise an agent must not, without his principal's full knowledge and consent, purchase for himself property which

he is employed to purchase for his principal. If he does so, it is a breach of faith, and he will be regarded as holding the property so purchased, or the proceeds thereof, in trust for his principal, although he contributes his own funds to the purchase, and he may be compelled to convey the property to his principal upon being reimbursed and upon his principal's complying with the contract of purchase."

I have examined a number of other authorities, in addition to those cited. In 67 Atlantic, 999, *Bergner v. Bergner*, the second paragraph of the syllabus is as follows:

"Where an agent to purchase purchases for himself, he acquires nothing thereby, though he contributes his own means to effect it, and the product will belong to his principal."

In this case, a son was acting as agent for his mother, who had furnished him money with which to buy certain stock. Out of his own funds he bought certain other stock, and the mother instituted the suit against him to have the stock transferred to her, on the ground that he was acting as her agent. The decree of the lower court was that the defendant be ordered and directed to assign all of the stock to the complainant and to account to her for the dividends received; and the court of appeals, in passing upon the matter, say:

"An agent to purchase will not be allowed to purchase for himself and to hold the property in his own name, unless he has openly and notoriously discharged himself from his agency." Citing the authority that I have already cited in the 1st A. & E. Ency., 2 Ed., p. 1082.

In 52 Atlantic, p. 197, will be found a case in which an agent was instructed to buy certain property at an attachment sale, and he was authorized to bid as high as \$900 for the property. He did not attend the sale, but he got somebody else to go and attend the sale and bid \$800, and he got the property. Thereupon, he turned around and sold it to the agent, and the principal brought an action against the agent, and it was decreed that the agent, under those circumstances, held this property in trust for the principal. I will not take time to further comment upon the case, but the principles already announced were applied in the case.

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Again, in 24 N. E. R., 827, *Edwards v. Dooley*:

“Where an agent purchases in his own name, with trust funds, the very property which his principal authorized him to purchase, the title is in the principal as soon as the purchase is made, and such title is not affected by the fact that the agent used the money furnished for his own use and purchased the property with money derived from other sources.”

This was a case of the purchase of personal property—a lot of hides. It is a New York case.

Under these cases, therefore, the law seems to be well settled, and following out the lines of these cases, assuming the facts in this petition to be true, plaintiff would have the right to be decreed the benefits of this contract, to have this contract assigned to him, and a decree providing that this property that was acquired under this contract be held in trust.

In this view, the other parties to the suit are not only proper parties but necessary parties here.

The averments of this petition are that this contract was not yet completed, that nothing but a check for \$500 had been delivered, that the balance of the purchase price had not yet been paid. Therefore, the county commissioners would be proper parties here, because they are a party to the contract which this plaintiff is seeking to complete and to have transferred to itself, with the rights arising thereunder. Plaintiff would also have the remedial right, by way of injunction, to prevent a transfer of the property. That doctrine is stated in the case cited this morning, found in 5 L. R. A., 1173. I need not repeat that case. There are two cases there to the same effect.

Another principle is involved here. It is a well settled principle of the law of agency that an undisclosed principal may sue a third party on contracts made by his agent when he discovers him, and the converse of this proposition is true. A third party making a contract with an agent for an undisclosed principal may sue that principal when he discovers him. So here, assuming the allegation to be true, if in fact Bohn made the purchase for this plaintiff, though undisclosed, these commissioners here would have the right to enforce this contract against

the undisclosed principal. There can be no question about that.

As I have said, the averments are that this contract has not yet been completed, that nothing but a \$500 check has so far been turned over to the commissioners. It was stated here this morning that this contract had been completed and payment fully made by Bohn & Kern to the commissioners. Of course, the court can not take notice of that, and can only note what is alleged here in this petition; but there is a feature of this case to which no consideration was given in argument, at least, as I recall it.

It is laid down here in the authorities cited this morning, and which I have already read, that the agent may be compelled to convey the property to his principal on being reimbursed.

If this principal here seeks the benefit of an uncompleted contract, it seems to me there should have been an allegation in plaintiff's petition of tender and offer to complete the contract. It is asked in the prayer that the county commissioners be ordered to accept from this plaintiff the sum of \$4,275 for the purchase of the superstructure as aforesaid; but in my judgment that does not go far enough. A tender should have been made to the county commissioners of the full amount of this purchase price, or any balance that was due upon it. No tender is alleged here and none is urged to have been kept up in court. Now if it be true that Bohn & Kern have paid this purchase price, then a tender should be made to Bohn & Kern, because the authorities are clearly to the effect that upon being reimbursed the agent may be compelled to assign the contract and the benefits arising thereunder.

It may be that at the time this petition was drawn it was not known just what the facts were about that. I do not know how that is. I do know that it was stated here this morning that payment in full had been made upon this contract. Viewing this case as a purely equitable action, I think that a good cause of action is stated here, especially if tender should be made to these commissioners, if they have not been paid in full, or to the proper party. I do not know who the proper party would be to whom to make the tender. Bohn would be entitled to his

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compensation and a tender of it. In other words, this plaintiff can not have the benefit of this contract, unless it tenders to the county the amount yet due upon the contract or to Bohn & Kern the amount they have advanced on the contract, together with their compensation, because he who seeks equity must do equity.

If such an amendment were made here to this petition (and I will grant that leave, because I think it would be in the interest of justice), construing this petition in this light, the court will overrule this demurrer and this motion; but if no tender is made and no amendment filed here setting up that such tender has been made as I have suggested, then the court will, at a later day, sustain both this demurrer and this motion.

INJURY FROM OBSTRUCTION ON SIDEWALK.

Common Pleas Court of Preble County.

FORREST D. WILLIAMS V. VILLAGE OF EATON.

Decided, November 14, 1910.

Sidewalk—Duty of Village with Reference to Obstructions Upon—Failure to Mark Obstruction by Signal Lights—Ministerial Functions.

1. The duty of a village to keep its streets and walks free from obstructions is a ministerial duty.
2. A petition which alleges that a contractor, with knowledge on the part of the village, erected barriers on a sidewalk which were not marked with signal or danger lights during the night time, and by reason of the negligence of the village in that regard the plaintiff suffered an injury, is good against demurrer by the village.

V. V. Brumbaugh, for plaintiff.

S. B. Foos, contra.

FISHER, J.

Heard on demurrer to petition.

This action is before the court on demurrer by the defendant village to the amended petition of the plaintiff on the ground that it does not state facts sufficient to constitute a cause of action.

The action is brought to recover damages for injuries sustained by the plaintiff based upon the averments in his amended petition in substance as follows:

The plaintiff avers the incorporation of the village under the laws of Ohio; that—

“On October 4, 1909, it contracted with one George Linderman for the construction of a cement sidewalk, under the supervision of said village, on the east side of Maple street in said village; that about October 5, 1909, said Linderman, in pursuance of said contract commenced the necessary excavation for the construction of said walk and erected an obstruction or barrier of heavy timbers across said sidewalk and entirely obstructed travel over said sidewalk; that said obstruction was maintained for a considerable time and was not supplied with signal or danger lights, and no means were provided to warn persons passing along said sidewalk of the erection of said obstruction, all of which was known to the defendant; that there is and was, at the time, a large amount of travel upon said walk; that on October 8, 1909, during the night season, said sidewalk was negligently and carelessly left by said defendant in said unsafe and dangerous condition; that plaintiff, on said night, was lawfully walking along said sidewalk and was wholly unaware of the danger and, without fault or negligence on his part, he ran into said obstruction across said sidewalk whereby he was thrown violently upon said sidewalk and suffered injury.”

The defendant village contends, through its counsel, that the petition does not show any duty enjoined by law upon the village to have been violated. Counsel insists that the village is only liable for the failure to perform a ministerial duty whereby one has suffered an injury.

The court is of the opinion that the contention of counsel is correct and the authorities cited by him maintain his proposition and can not be disputed, but counsel insists that the village after it put up the barriers was not bound to furnish some means of advising users of walks that the barriers were there, claiming that having erected the barriers it had performed its whole duty, directly in opposition to his authorities and case. It is the imperative duty of municipal corporations to keep the highways, side and crosswalks (which are part of the highways) free from obstruction and nuisance, and this is a ministerial duty.

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The averment in the amended petition is that the village negligently, with knowledge of the fact, permitted an obstruction across this sidewalk without any light or danger signal to notify persons, lawfully using the sidewalk, of the obstruction. This would be a violation of a duty, ministerial in its nature, imposed by law upon the village and if the plaintiff is able to establish that fact he would be entitled to recover against the village.

The allegations in the amended petition are not as definite as the court thinks they should be, but on careful examination I am of the opinion that the petition as against the demurrer is good. A motion might have been interposed before the demurrer and the plaintiff been required to make his petition more definite and certain in relation to the allegation as to the contract and the supervision of the village over the contractor, and the knowledge that the village had as to the want of a danger signal to warn pedestrians of the obstruction across the sidewalk.

The demurrer will therefore be overruled.

AS TO LIABILITY OF SURETIES FOR STATE FUNDS DEPOSITED IN BANK.

Common Pleas Court of Franklin County.

STATE OF OHIO V. FEDERAL UNION SURETY CO.

Decided, June 17, 1911.

Principal and Surety—Knowledge of Its Own Officers is Chargeable to a State in Dealing With Sureties—Bonds Which It is Not Necessary to Renew—Provisions of Depository Act Which Do Not Affect the Hazard of the Surety—Jurisdiction of State Board of Deposit—Connivance Between Principal and Officer—Giving Bond Releases the Surety—Surety for State Deposit Not Liable for Money Secretly Deposited—Sections 323, 326 and 327.

1. The state in dealing with a bank and surety company as to deposits of state moneys, under the provisions of Section 326, is chargeable with knowledge possessed by the state treasurer, and is incapacitated by reason of any legal omission or commission in his dealings with a bank as an individual with reference to monies belonging to the state.

2. No renewal is necessary of a bond given to secure repayment of monies belonging to the state which have been loaned to a bank under the depository act.
3. The provisions of Section 327, relating to lending to depositories monies belonging to the state, the giving of bond, etc., constitute a part of the bond, but those parts which are directory to the board of deposit and which could not in any way affect the hazard of the surety do not afford a basis for subsequent relief to the surety.
4. Such a bond is not retrospective, and the state appearing in the courts to ask its enforcement is shorn of its sovereignty and held to the same rules that apply to a private citizen.
5. The state board of deposit, after having designated a depository, is not required to exercise continuous supervision over the bank containing the deposit, but after the designation has been made the discretion is solely with the state treasurer, and failure of the board to subsequently meet and pass upon the qualifications of a designated depository is not such negligence as will release an accepted surety.
6. Since principals are bound by the maximum of good faith in dealing with sureties no recovery can be had from a surety for state funds deposited in a designated bank on the ground that the funds were obtained by secret connivance between the state treasurer and the officers of the bank before the enactment of the depository law and remained so converted for a considerable period before bond was given to secure the deposit.
7. Where the funds deposited by the state as recited in the bond were neither increased nor decreased, but consisted of funds therefore secretly placed in the bank, the surety is not bound therefor under the strict wording of their liability.

F. T. Eagleson, for plaintiff.

Bennett & Westfall, contra.

DILLON, J.

The state of Ohio sues the defendant on a bond in the sum of \$20,000 with interest at the rate of $2\frac{1}{2}$ per cent. per annum from February 3, 1908, to May 16, 1908, with interest at the rate of 6 per cent. per annum from said last named date.

The petition alleges that this bond was given pursuant to the State Depository law, being the act 97 O. L., 535 (General Code, 321, *et seq.*), and that after giving said bond, securing the state from loss for money thereafter to be deposited in the Euclid Avenue Trust Company of Cleveland, Ohio, that the

state did so deposit the sum of \$20,000 and the same was evidenced by three certificates of deposit, two for \$5,000 each, dated September 10, 1906, and one for \$10,000, dated December 10, 1904. The petition sets forth the terms of the bond, and a copy thereof is attached as an exhibit, and further alleges that the said Euclid Avenue Trust Company made an assignment for the benefit of its creditors; that demand for payment has been made upon the assignee and also upon the defendant surety company, which has been refused.

The answer of the defendant is made up of a number of facts alleged along with a great many legal conclusions stated. These various answers and legal conclusions have been ignored by any motion or demurrer, but the state has filed a brief reply setting forth, among other things, that by virtue of an agreement between the plaintiff and defendant a dividend of 50 per cent., declared and paid by the assignee, has been received by the state without prejudice.

Notwithstanding the fact that irrespective of the decision in this case the legal questions presented will be taken to the higher courts for review, this court has deemed it its duty to take full time and consideration for decision. The trial was originally before a jury, but at the conclusion of all the evidence each side moved that the court direct a verdict and enter judgment in its favor. Whereupon the court discharged the jury and reserved the case for this decision.

The facts in the case are brief. Prior to the passage of the depository act above mentioned, it was, according to law, a conversion and embezzlement for a state treasurer to take any money away from the treasury and deposit it in any bank. In spite of this, however, for some time prior to the passage of this act, the state treasurer surreptitiously and by connivance with one Craft, a close political friend and president of the Euclid Avenue Trust Company, took from the state treasury, and therefore, as a matter of law, converted and embezzled the sum of \$50,000 and handed the same over to the Euclid Avenue Trust Company by an arrangement whereby he, the said state treasurer, in his individual capacity, should receive the usufruct therefrom by way of interest.

After the passage of this act, it was desired by these parties, the said treasurer now acting in his official capacity and not as an individual, to continue this deposit under the new law and to restore to the state of Ohio the money thus previously converted and on deposit in this bank. In just what name the state treasurer had been depositing this \$50,000, I do not believe is disclosed. But for the purpose of carrying out this desire to restore this converted money to the state in his official capacity, the arrangement was first made with the defendant company whereby it entered into a bond with the state together with the Euclid Avenue Trust Company, reciting that, whereas, the said Euclid Avenue Trust Company has been duly designated and approved as a state depository under the act aforesaid, and that, whereas, the said Euclid Avenue Trust Company had been designated under the law as one of the depositories and had been selected by the treasurer of the state of Ohio, and that said treasurer of state had agreed to deposit moneys of the state of Ohio in accordance with said act; therefore, "if the said the Euclid Avenue Trust Company shall pay over to the treasurer of state for the use of said state of Ohio upon demand made therefor or upon his written order any and all moneys which from time time hereafter may come into the custody of said the Euclid Avenue Trust Company under and by virtue of said act," etc., then this obligation shall be void, otherwise to remain in full force and effect.

The defendant has set forth nine grounds or headings in its brief why the defendant is not liable in this case. I do not agree with any of these grounds except one, which I will discuss last. So far as the knowledge of the state treasurer is knowledge of the state in this case, I agree with counsel for the defendant. The board of deposit, which is created by the act aforesaid, consisted of Treasurer of State, who was chairman, the Auditor of State and the Attorney-General, and their sole duty was to meet on the first Monday in October of each year or any time afterwards upon the call of the chairman and designate such banks and trust companies within the state as would be eligible to be made state depositories and to stamp all applications either approved or re-

jected. The function of this board ceased with this work, and the statute, by Section 4 thereof (General Code, 326), gave to the Treasurer of State the discretion and right to deposit any portion of the public moneys in his possession in any such designated bank which had been thus approved by the board. In dealing, therefore, with a bank and a surety company, the knowledge of the treasurer is chargeable to the state and the state, therefore, is incapacitated by any legal omission or commission with reference to its dealings with the bank the same as an individual, having reference, however, to the various provisions of the act in question, of which, of course, the parties must take notice.

The defendant makes a claim that it is released by the negligence of the board of deposit in not meeting, as provided by General Code, 323, a second time and passing upon the qualifications, responsibility, etc., of this Euclid Avenue Trust Company. My interpretation of this act is that the board did not have to re-designate or re-examine a bank, that the act did not go so far as to require continuous supervision; but that once having been designated, the discretion was solely with the treasurer to watch these banks and to rely upon his own judgment or that of the surety with reference to the future. The weakness of the act in this case is no excuse for judicial legislation or for the extension of interpretation. The argument which the state has so ably presented on this point I adopt as my opinion here.

Likewise, without going into detail, the court adopts the view stated by counsel for the state with reference to the claim that these funds were not public funds; that the state forms a part of the bond is true only in part. That part of the statute (General Code, 327) which relates to the lending of the money and the giving of the bond and the manner thereof is a part of the bond, but those parts of this act which are directory to the board of deposit and which could not in any way affect hazard or risk of the surety company will afford it no relief. That a bond given is not retrospective and that the state appearing in the courts is bound by the same rules as a private person and is shorn of its sovereignty can not be seriously disputed. This court also adopts

the argument in full presented by the state that no renewal of this bond was necessary. Whatever may have been in the mind of the Legislature in providing for a bond, and whatever reasons might actuate us to see the necessity for a time limit upon the bond, the fact is that the bond was unlimited, and the act, if defective in this respect, can not be aided by any strained or unnatural interpretation.

The defendant has further argued that a demand on the principal must be averred in the petition and proven. The decision of my associate, Judge Rogers, on this point, is not only conclusive upon this branch of the court but meets with the approval of this branch of the court.

The one point which has caused this court long and serious consideration and conflicting opinions, *pro* and *con*, has been the relation of the surety bond to the peculiar nature of this deposit. The total sum of money which the Treasurer of State had previously converted and deposited in his own name in this bank was \$50,000. The evidence conclusively shows that this \$20,000 was a part thereof. If this money, previously deposited, is to be viewed and considered as the state's money in the sense that it was money of the state exclusively, then this money clearly was already deposited and could not possibly come within the terms of the bond which could only apply to money deposited after the giving of the bond. But as a matter of law I think we must hold, and on this point I do not think there can be much contention, that the state's only interest in it was that of any other owner of money which had been converted. It could impress its trust upon it and follow it, but as a matter of fact it was converted with the intention, of course, of paying it back to the treasury. The argument is very strongly made and ably presented that by this subsequent issue of the certificates of deposit for \$20,000 of this embezzled money the treasurer as an individual restored to the state in proper and legal form the money he had previously converted and which had already been on deposit there; that he had the option of either taking the money in physical form back to the state treasury and then making another trip back to Cleveland and depositing it in the proper form as it was, or do so di-

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rectly, and I think this view so far is correct. In other words, disregarding mere form, this \$20,000 was properly restored to the state on the dates when the certificates of deposit were issued in the form required by the new act. So far, therefore, the solution of the question would be in favor of the state's recovery in this case as against the Euclid Avenue Trust Company, for no other person after those dates had any title whatever to this money.

The difficulty, however, and the question which has caused much conflict, has been the relationship of the surety to this state of facts. Even if we go so far as to say that this money thus restored to the state by the change in the form of deposit might be construed as money "hereafter deposited" within the meaning of the bond, the circumstances are such as would release the surety. Since we are to measure the law in this respect not by the amount of money or amount of risk, great or small, as influencing a surety and as affecting his rights under the general law of suretyship, but must measure it by principle, it must be conceded that there were at least three important elements in which a surety's rights have been infringed. A surety in assuming a risk is, by well-settled law, entitled to know and be informed of any moral delinquency on the part of the risk which ought to be communicated to him and which would have a natural tendency to affect his going or not going upon the bond. This doctrine has been laid down in the state of Ohio in two very strong cases. In the case of *Smith v. Josselyn*, 40 Ohio St., 409, a principal had knowledge that his agent, by culpable carelessness, had lost money collected by him in the discharge of his duties and for that reason required that he give bond. The same was given, but the principal did not inform his sureties of his agent's former culpable carelessness and having no knowledge thereof, it was held that the principal could not avail himself of the guarantee thus obtained. Again, in the case of *Dinsmore v. Tidball*, 34 Ohio St., 411, a principal having a belief founded on reasonable information that his agent was a defaulter, required sureties for his fidelity in the future, holding him out as a trustworthy person. Again, it is held that such

principal could not avail himself of the guarantees so obtained from the person who was ignorant of what was known to the principal, and which ought to have been disclosed by him to the surety.

The principle above announced is a general one, and it is unnecessary to burden this opinion with further citations. The secret connivance, therefore, between this bank and the treasurer whereby so large a sum of money as is involved in this case was and had been for a long time converted, was a fact which it would seem the treasurer acting for the state and having full knowledge thereof should have communicated.

But if we consider this first proposition one of doubt, we come to the second and third propositions, which are, first, that a bond of such a character as this means before any liability can accrue upon it that there is to be an increase in the deposit and therefore an increase of strength on the part of the risk and a consequent diminution of the liability; and, second, the right which a surety has of relying upon such an increase in deposits by the acquisition of increased funds so that the bank has more after incurring the liability than before. Thus, it is easily conceded that a surety company might go on a bond for \$100 to a bank which had a deposit of only \$100,000 on the theory that on the giving of such bond its liability is lessened by reason of the fact that the bank is thus strengthened to double its former condition. In other words, this surety company was becoming a surety for more money, not for secret money already deposited. The defendant had the right and could only presume that no such deposit could have been made prior to the giving of this bond or the passage of the law.

Consistently, therefore, with two most strongly established principles, first, that sureties can only be held within the strictest wording of their liability, and secondly, that principals dealing with sureties are bound to the very maximum of good faith, the opinion of this court is that the plaintiff can not recover, and a judgment will be entered for the defendant for the costs.

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**CAUSE OF ACTION DEFEATED BY TARDY SUBSTITUTION
OF PARTY PLAINTIFF.**

Superior Court of Cincinnati.

**JOHN C. HEALY, TRUSTEE, v. THE SECOND NATIONAL
BANK OF CINCINNATI.**

Decided, October, 1911.

*Substitution of Party Plaintiff—Bar of the Statute Not Affected There-
by, When—Application of Statute of Limitations where Subrogation
is Not Asked—Knowledge of an Involuntary or Co-Trustee of Inten-
tion of Acting Trustee to Misapply Funds—Sections 11261, 11222
and 11227.*

1. Substitution of an assignee of the original party plaintiff, where not asked until the statute of limitations has run, does not avoid the bar by relating back and making the substituted party the plaintiff *ab initio*.
2. Where the action is an attempt to recover from the defendant on an implied promise as co-trustee, the six years rather than the ten years statute of limitations is applicable.

Healy, Ferris & McAvoy, for plaintiff.

Charles M. Leslie, contra.

HOPPEIMER, J.

This action was originally brought by John C. Healy, trustee, against the Second National Bank, to recover twenty-three hundred and forty (\$2,340) dollars and interest. the value of two registered bonds.

Mr. Healy had been appointed by the probate court trustee of one James Robinson, vice one Santmyer previously appointed by the same court, as trustee to succeed John F. Robinson and Charles M. Robinson (resigned). the original trustees under the will of John Robinson.

Santmyer was removed by said court for failure to file his account and for otherwise failing to carry out his trust. The American Bonding & Trust Company was surety on the bond of Santmyer.

Mr. Healy, as trustee, failing to secure from Santmyer the trust property belonging to his *cestui que trust*, James Robinson, which it was claimed included United States bonds involved in this action, brought suit against the Second National Bank, evidently on the theory that said bank in purchasing these bonds standing in the name of Santmyer, trustee, did so with notice that they were trust funds, and that failing to exercise proper diligence in inquiring as to the trustee's right to sell same, participated in Santmyer's wrong and fraud, and therefore was under an implied promise to pay the money back.

A general demurrer to this petition was sustained by this court (William H. Jackson, J.) in a written opinion. The general demurrer to the amended petition was overruled by Rufus B. Smith, J.

This amended petition differs from the original petition in particulars to be later noted.

The defendant, by answer, *specifically* denied the averments of the amended petition, and by way of second defense averred that the plaintiff had no interest as trustee or otherwise in the cause of action, and that the American Bonding & Trust Company had fully repaid and recompensed said trust estate for any and all loss suffered by reason of the alleged acts of said Santmyer.

John C. Healy, trustee, thereupon verified and filed a reply (February 3, 1908) as plaintiff, denying each and every allegation of *new matter* contained in the answer.

Under this state of the pleadings, and more than six years after the payment had been made by the bonding company, the cause was tried, and at the conclusion of the evidence for plaintiff the American Bonding & Trust Company asked leave to be substituted as plaintiff, which motion was resisted by defendant.

The defendant contended that inasmuch as it appeared that Healy, trustee, had no longer any interest (his claim as trustee having been fully paid by the bonding company), he could not recover, so that as to him the action was terminated, and it was claimed that the American Bonding & Trust Company could no longer be substituted in the place of Healy, trustee, because the statute of limitations had run against the bonding company,

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even assuming that it had acquired some rights in this action. The bonding company contended that at the time it reimbursed Healy, trustee (eight or nine months after this suit was begun), it entered into a written agreement with Healy, trustee, whereby it claims it became immediately subrogated (conventional subrogation) to all of plaintiff's rights, and that by virtue of this agreement it became entitled as assignee or transferee to continue this action for its benefit and under the original heading and style, or that it had the right at any time before judgment and in the discretion of the court, to be substituted as plaintiff, by virtue of Section 5012, Revised Statutes.

Section 5012, Revised Statutes (11261, General Code), is as follows:

“* * * upon the disability of a party the court may allow the action to continue by or against his representative or successor in interest; and, upon any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted for him.”

The question thus presented at the conclusion of plaintiff's case, was not without difficulty, and on request the hearing stood over to enable counsel to submit briefs, which was later done. Mindful, however, of the admonition of our Supreme Court with reference to the disposition of questions of such importance on motion, I concluded that the matter ought not to be finally disposed of at such stage of the proceedings (*Finck v. Finck*, 10 O. S., 501), but that better practice probably required that objection be taken by pleadings, which was accordingly done.

Whether the court was in error on the question of practice is immaterial, as the objection was again taken by pleadings, as suggested by the court, and the point made at the conclusion of plaintiff's case was again urged on the final submission of the case.

Substitution of the American Bonding Company having been allowed without prejudice to defendant's rights, the question, therefore, would be not whether substitution was *necessary* (that is reflected by the evidence showing that Healy, trustee, had been wholly paid, and by the motion in and of itself), but

whether the court was justified in substituting a new party (the bonding company) in place of an original plaintiff, who sued in a representative capacity, more than six years after such representative powers, so far as the evidence shows, seems to have ceased, and more than six years after the rights of the new party seem to have accrued.

Assuming that the bonding company acquired rights from Healy, trustee, and could pursue the bank in this action (a question not without serious doubt, since Healy's claim against Santmyer was wholly extinguished), and assuming that the bonding company was not required to institute an action *de novo*, but had the right to continue this action by virtue of Section 5012, it is obvious that if the bonding company acquired, as claimed, all of Healy's rights, whatever those rights may have been, that the bonding company became the real party in interest at the time it reimbursed Healy, trustee, and obtained the assignment. If it became the real party in interest at that time (and certainly it was no more so when it prayed substitution), then it devolved upon it, even though it may not have been compelled to begin that action, to *prosecute* same as such real party in interest. If this is not true, it is manifest that Section 4993, the terms of which are explicit, is rendered nugatory.

Section 4993, Revised Statutes (11241, General Code), provides:

"An action must be prosecuted in the name of the real party in interest, except as provided in sections forty-nine hundred and ninety-four and forty-nine hundred and ninety-five; but when a party asks that he may recover by virtue of an assignment, the right of set-off, counter-claim, and defense, as allowed by law, shall not be impaired."

If the bonding company had the right to continue the original action, with Healy, trustee, as nominal plaintiff, and if it was to be permitted to substitute the bonding company as plaintiff, at any time before judgment, so long as the nominal plaintiff was still living, as the bonding company claims, then it is evident that Section 5012 has ingrafted an exception on Section 4993, or has entirely repealed it. But such construction, as has been well said in argument, is not to be favored, as proper construc-

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tion requires that effect be given to both sections if possible so to do.

Now if the American Bonding & Trust Company had the right to *continue* the original action, it is evident that it did not *prosecute* the action because the record itself shows that as late as February 3, 1908, although this was more than six years after Healy, trustee, had any interest as such trustee in the action, *a reply was certified and filed by Healy, trustee, as plaintiff*, which reply denied the averments of the answer, which were to the effect that *Healy, trustee*, had no interest as trustee, or otherwise, in the action, and that the bonding company had fully recompensed the trust estate. True, it is contended by the bonding company in answer to defendant's argument, that the reply was an active concealment by a mere nominal plaintiff of the bonding company's interest, that the matters set up in the answer were not material, and therefore could have been stricken out on motion, or were subject to demurrer; that the reply merely denied the averment that the trustee had no authority to bring the action, and denied in effect that a transfer pending the action was a defense, relying, so it was argued, on *Lowery v. Anderson*, 57 O. S., 179. But in my opinion, the answer tendered a vital issue, which was that Healy, trustee, was not a real party in interest; that he had no interest in the suit; that his trust estate was fully restored.

While *Lowery v. Anderson* decided that a transfer pending the action was no defense, it did not decide the point thus raised, as appears from what the Supreme Court itself has said of that case. In *Insurance Co. v. Carnahan*, 63 O. S., 258-268, the court, speaking of *Lowery v. Anderson*, say:

"That case does not touch the point which arises here, viz.: that the actions were not begun *or prosecuted in the name of the real party in interest.*" [Italics mine.]

Lowery v. Anderson, therefore, is hardly authority for the proposition that a defendant may not set up by answer that plaintiff, *in the utter absence of anything of record to show that a transfer had been made*, had no interest in the action; that his trust estate was fully paid; that he was not a real party in interest.

But it would seem to me that necessity for prosecution of the action by the real party in interest, immediately after the cause of action accrues or within the period allowed by law, is further determined by *Insurance Co. v. Carnahan (supra)*. That case the bonding company earnestly insists, however, has no application to a case where (as here) the nominal plaintiff is not dead, and plaintiff insists that the court in the Carnahan case was simply considering a question of abatement or conditional abatement of the action due to death of a party solely, and that the court had in mind *solely* the revivor statutes relating to *death* of party. Attention to that case will show, however, that the court had several questions before it, growing out of different actions, and which actions involve a different state of facts.

In the first branch of the case, the court determined whether a proper revivor had been made in one action, where it seems suit had been brought by the partnership, in the partnership name, and after bringing the suit one of the partners died. The surviving partner revived the action, but the court held that the revivor had not been properly made.

In the second branch of the case the court had under consideration the effect of certain *absolute* assignments which had been made by the Carnahan firm, on the one hand, *before suit was brought*, and on the other *after suit was brought, and while all the partners were living*, and the language of the court would indicate, that it was now considering the effect of such absolute assignments, made before and after suit brought, and with reference to the question, as to whether or not such actions were *begun* or *prosecuted* by the real party in interest.

After stating that under both these assignments, H. B. Claffin & Company became the real party in interest, that Carnahans were left simply as agents for the purposes of mere collection (that is, Carnahans had no interest in the action), the court say that:

“The only difference in the effect of them was that under the one first mentioned above, an action *could not be legally begun and prosecuted except in the name of H. B. Claffin & Company*, while under the second mentioned assignment the action should have been revived by substituting the assignee of the interest as plaintiff.

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“The case of *Lowery v. Anderson*, 57 O. S., 179, does not apply here. The point of that decision was that the transfer of interest pending the suit was no defense to the action, and that the assignee might be substituted for the original plaintiff. *The case does not touch the point which arises here, viz., that the actions were not begun or prosecuted in the name of the real party in interest.* We think that in this respect also there is reversible error in the proceedings of the court below.” [Italics mine.]

If, therefore, the absolute assignment after suit begun, and while all the parties were *living*, leaving no interest in the Carnahan firm, necessitated “substituting the assignee of the interest as plaintiff,” it would appear that the right to prosecute the action passed to H. B. Clafin & Company immediately on said assignment, and that therefore it was its duty, if it desired to continue that action as assignee of the partnership, which action had then conditionally abated, to prosecute the same as real party in interest and be substituted as plaintiff.

If this is a correct interpretation of the Carnahan case, then precisely the same duty devolved on the bonding company after the trustee assigned all his interest, whatever that may have been, to said bonding company. But even in the absence of the Carnahan case we would find it difficult to justify a view that Section 5012, without in itself expressly excepting Section 4993, contemplated that where an absolute transfer had been made pending the action, the assignee could continue the original action under the original heading and style, and with the nominal plaintiff actually filing and verifying pleadings as though he were still the real party in interest, and without the real party in interest filing any petition in the nature of an intervening petition, or in fact, any pleading of any kind whatsoever, to indicate that it, as real party in interest, was prosecuting the suit. If such right was conferred by Section 5012, the anomaly results that the real party in interest may not only passively conceal his connection with the action, until at some time prior to judgment he chooses to reveal it, or the nominal plaintiff (as was done here), in reliance on *Lowery v. Anderson* (which, as we have seen, does not decide the point of prosecution by the real party in interest), may choose to actively deny it for him, even where

as here the issue is directly and squarely raised by a proper pleading.

That such is probably not the law would seem to be further indicated by *Railroad v. Falk*, 62 O. S., 297, in which case it will be noticed that although the plaintiff had not parted with his entire interest, there was nevertheless an intervening petition, which would seem to be in accord with the view taken in *Insurance Co. v. Carnahan*.

If then, when substitution was asked for, it appear that the statute of limitations had run against the bonding company, then substitution could not be properly made. In other words, if when substitution was asked, the statute of limitations had run, substitution could not relate back, and so as to avoid the bar, unless by virtue of some special provision.

In *Lilly v. Tolbin*, 103 Mo., 477, cited by plaintiff, it appears that leave was given to substitute in place of the incorporated society, and it was held that this was merely substituting the proper for the improperly named party, and such amendment was held to relate back to the commencement of the action. The court, as will be observed on reading the case, relied for the ruling on *Ludwig v. Insurance Co.*, where it was held that substituting the party having the legal right to sue, instead of one improperly named as plaintiff, was not the commencement of a new action. Of course, no such claim could be made here, as under the pleadings in this case it affirmatively appears of record, by verified reply, that up to the time of substitution, Healy, trustee, was the real party in interest of record.

In *Burton v. Insurance Co.*, 26 O. S., 467, an error was made in the summons and amendment was allowed, and this was held to have been properly allowed because of Section 137 of the code, and because the contract sued on itself contemplated the amendment (Welch, J.).

On the other hand, and directly opposed to the contention of plaintiff, and to *Railway Co. v. Jenkins* (103 Ill., 588, and in which no section similar to our Section 4993 is involved), *Cogdell, Assignee, v. Exum*, 69 N. C., 464, holds:

"An amendment by which the assignee was made a plaintiff more than two years after his appointment did not have the effect

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to relate back and make him the plaintiff *ab initio*, and thereby defeat the statute of limitations.”

The bonding company's right of action, if any, having accrued when the transfer was made, we must determine whether the six years' statute, Section 4981 (General Code, 11222) or whether the ten years' statute, Section 4985 (General Code, 11227) is applicable.

Now, as this is not an action asking for subrogation, or to compel subrogation, or to be subrogated to *particular securities*, or to a *particular judgment*, plaintiff itself contending (see plaintiff's brief, p. 96) that subrogation took place when the money was paid and agreement executed, as by conventional subrogation, cases such as *Neal v. Nash*, 23 O. S., 483; *Zuellig v. Hammerlie*, 60 O. S., 27, which indicate the ten years' statute, are certainly not in point. The theory of this action being as stated at the outset, an attempt to recover from the bank on its implied promise as co-trustee, it would appear that the six years' statute is pertinent. *Poe v. Dixon*, 60 O. S., 124; *Neilson v. Churchill & Fry*, 16 O. S., 553.

The bonding company's right of action having accrued August 6, 1901, it follows that when leave to substitute was asked and given, without prejudice to defendant's rights, the statute of limitations had fully and completely run, and the action was therefore barred.

If this conclusion is correct, it disposes of the case. But even if it be determined that the court is in error on this proposition, there are other considerations which prevent recovery.

The amended petition in this case differs from the original petition in this, that it alleges that the bank had *actual* knowledge that Santmyer when he sold said bonds intended to commit a breach of trust, and *that with such knowledge*, the said bank at the time of such sale placed the proceeds thereof to the individual credit of Santmyer on its books, and thereafter allowed him to draw out the same for his individual purposes. It is apparent, therefore, that the amended petition relies on *actual* knowledge of the bank that when Santmyer sold the bonds he *intended* to commit a breach of the trust, and that with such knowledge the bank placed the proceeds to his individual account and permitted

Santmyer *with this knowledge* to draw out the proceeds on his individual check.

Now there was no evidence to show actual knowledge on the part of the bank, when it bought the bonds, that Santmyer *intended* to commit a breach of trust, and there was no evidence to show that the bank *actually* knew at the time it bought the bonds and *deposited the proceeds*, that Santmyer *intended* to check out the funds for *his personal uses*, and if, as was determined by this court on the demurrer, there was no liability because of the purchase of the bonds, because of the duty that rested on Santmyer to convert the bonds into money, so as to have the funds in original shape for investment, when properly ordered, the bank was surely not compelled, in the absence, as here, of actual knowledge, or of extrinsic evidence or circumstances that would put it on its guard that a breach of trust was about to be committed, to presume that he would use the proceeds of the bonds (after they were deposited) improperly or for purposes other than for the trust estate. Moreover, when the bank had deposited these proceeds to Santmyer's account (there being no evidence of actual knowledge), the holder of Santmyer's checks could have compelled the bank to honor the same. See *Morse on Banks and Banking*, 317.

If, then, it be conceded that the tendency of modern decisions is to enlarge the jurisdiction of the probate court with reference to particular matters delegated that court, and that the probate court has general equity power with reference to the subject-matter and as claimed for it (and which I am convinced it has), and it be held that where such direction is given by will, the probate court may direct the investment and reinvestment of trust funds, and it be conceded that plaintiff has shown by the preponderance of the evidence that both Santmyer and the bank bought and disposed of those identical bonds, we must still determine the precise directions of this testator, in order that the extent of Santmyer's duty and powers when he originally bought, and later, when he sold the bonds, may be ascertained.

Now I do not think that the testator called upon the probate court to reinvest or exercise a power of supervision over reinvestment.

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The testator intended and directed that the probate court, for the reasons stated, should have the power to change the *terms and conditions of the trust from time to time*, but he did not intend to direct that the probate court was to change the investment or make or order or supervise reinvestment of the trust fund from time to time. The language used is susceptible of no meaning other than that the probate court was to *declare* and *fix* the character of the investment prior to the investment being made by the trustee, and no other meaning can be arrived at, unless resort be had to unnecessary transposition. This court, through Judge Jackson, construing this provision, reached this conclusion also, and the court said:

“For it will be noted that the will provides that ‘the investment of the trust fund and the conditions * * * are to be declared and fixed by the probate court.’ This clearly means that the probate court is to determine and fix in advance of any investment what the character of such investment shall be.”

And the court further held, and this court would feel bound by the ruling on demurrer, that the probate court did not so fix the investment merely because it confirmed the account, and that therefore, if the trustee originally bought the bonds without authority, the approval of the *account* did not alter the *right* and *duty* of the trustee to convert the bonds unauthorizedly purchased by him into money, so as to have the trust fund in its original shape until the probate court should direct how it should be invested. And the court held that there could be no breach of trust on the part of the bank in buying these bonds, because it was the duty of the trustee to convert the bonds back into money, as above stated. It is only necessary for me to add, that aside from the mere evidence as to confirmation, there was no evidence offered to show that the probate court actually “fixed the investment” at any time.

The plaintiff's claim, therefore, resolves itself to this, that the bonds standing in the name of Santmyer, trustee, was sufficient notice to the bank that Santmyer was not the owner, and that he had no power to sell, and that he was committing a breach of trust in the sale thereof, and so as to make it a party to the conversion when it bought the bonds and deposited the proceeds to

Santmyer's account. But as the evidence adds nothing to the allegations of the original petition, therefore the precise claim has heretofore been determined adversely by this court on the demurrer.

It may be stated, further, that cases such as *Duncan v. Jaundon*, 15 Wall, 165, *Gaston v. Bank*, 29 N. Y. Eq., 26; *Cohnfel v. Tanebaum*, 176 N. Y., 126, are not applicable here because this case fails to reveal any, even the slightest evidence of bad faith. In the case cited a *distinct advantage* was obtained. In the case at bar the evidence, if it shows anything, shows that the bank paid full value for the bonds, and if it enjoyed any profit it was such only as would ordinarily accrue to the dealer in such bonds.

Then, too, a number of cases are cited by the bonding company which involve questions arising on transfer of stock standing in the name of the trustee and it seems that, where stock is involved, a corporation because of the fiduciary relation to its stockholders, owes a duty to the stockholders to protect them in the transfer of stock, and particularly so where circumstances put them on notice that a breach of trust is about to be committed. This principle is elucidated in the leading case of *Geyser-Marion Co. v. Stark*, 106 Fed., 558, relied on by plaintiff, in which case also such extrinsic facts appear. The mere statement of the case shows, however, that it can have no application here. The same may be said of cases such as *Shaw v. Spencer*, 100 Mass., 382, and that case, for example, involved a pledge of stock held by a trustee, and where the court laid down the rule that it was the duty of the pledgee to inquire as to whether the pledgor had the power to pledge the stock for what the pledgee *knew* was a *private* or *firm* debt. The court clearly states that the pledge of *trust property* for a *firm debt* is *prima facie unauthorized* and unlawful, and that it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. And again, that there is no reason for *assuming* that a trustee is authorized to pledge trust property for his own debt, all of which must be distinguished from a case where it was incumbent on him to convert these bonds into money so as to have the funds in shape for such investment as the will contemplated and directed. And further, where nothing appeared at the time of the sale and de-

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posit of proceeds to indicate, as a pledge for a private debt, in itself would indicate, *that Santmyer intended to use the proceeds for his individual purposes, or to show bad faith.* It might further be noted that in *Shaw v. Spencer*, the court significantly and expressly refrains from laying down the rule that would apply had the case been one of sale.

That the bank under the circumstances in this case was not put on its guard or charged with notice, so as to render it liable as an involuntary or co-trustee. see *Safe Deposit Co. v. Bank*, 194 Pa. St., 334; *Batchelder v. Bank*, 188 Mass., 25; *Jelke v. Goldsmith, Admr.*, 52 O. S., 499; *Bank v. Village of Hyde Park*, 101 Ill., 595.

It was urged that the bank's duty was in some way accentuated, because the registered bonds, which it is charged with having bought, were not negotiable, and because the certificate on the back of the bonds was in and of itself sufficient to put the bank on notice. Without deciding what the effect of such questions would be, or whether they would alter the conclusions reached herein, if this action were against the party who issued the bonds, I fail to see, in view of what has been said with reference to Santmyer's right and duty to dispose of the investment which he had made unauthorizedly, and so obtain the money for proper investment, wherein the point thus raised can be of avail here.

Additional reasons are advanced by defendant in opposition to plaintiff's claim, but in view of the foregoing consideration I think it sufficiently appears that there can be no recovery in this action by the bonding company, even if it be determined that substitution was properly made. In my opinion the judgment must be and the same is accordingly awarded the defendant.

RECEIVERS FOR CORPORATIONS.

Common Pleas Court of Hamilton County.

HERMAN GOTT V. THE F. SCHULTZE COMPANY.

Decided, October 28, 1911.

Receivers—Appointment of, Will Not be Made for Convenience of Corporations—But Must be Based on a Prayer for Legal or Equitable Relief—"Usage of Equity" Can Not Ripen from Local Practice—Section 11894.

Ground for the appointment of a receiver for a corporation is not shown where there is no prayer for legal or equitable relief, and especially if the purpose appears to be merely to stave off creditors by preventing them from realizing on their claims through suits at law.

Fred W. Hinkle and Frank Seinsheimer, for plaintiff.

GORMAN, J.

Opinion on application to appoint a receiver.

The plaintiff in this action alleges that he is a stockholder and creditor of the defendant company. He brings this action on behalf of himself and all other stockholders and creditors of the company. He further alleges that the defendant is a corporation organized under the laws of Ohio, during business in Cincinnati; that it is indebted to him on account of salary in the sum of seven hundred dollars (\$700); that it is indebted to divers and sundry other persons in various sums and that the creditors of the said corporation are pressing their claims for payment and are threatening to bring suits against the corporation and will do so unless a receiver is appointed; that the good will of the corporation is a valuable asset; that its business is peculiar and that it is required to order valuable goods, such as cut glass from foreign countries a long time ahead and is obliged to pay for the same a long time before it can sell and realize upon the goods so purchased; that on account of the condition of the money market and the trade, it is unable at this time to secure loans at the banks sufficient to meet its obligations as they fall due, but that the company is amply solvent

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and that its assets greatly exceed in value its liabilities; that unless a receiver is appointed, suits will be brought against the company by its creditors on their claims and that the assets of the company will be dissipated and its good will destroyed and irreparable injury done to the company, which has been in business in Cincinnati for over sixty years. He further alleges that there is a great profit in the sale of the articles handled by the defendant corporation and that if the business were permitted to be conducted by a receiver under the direction and order of the court, creditors would all be paid in full and the business would be saved to the creditors. The plaintiff therefore prays that the court will administer as a trust fund the property and rights of the defendant and marshal all the assets, ascertain liens and priorities thereof, and enforce the rights and liens in equity of the creditors; that a receiver be appointed with full power and authority under the direction of the court to manage, operate and continue said business and adjust all disputes and controversies, settle and sue for and collect all indebtedness and recover all property of said defendant, and that all persons be required to deliver up forthwith to the receiver, the property, assets, books of account, vouchers and papers in any way relating to the business, and that all persons be enjoined from interfering with the receiver, etc.

The plaintiff does not ask for a judgment upon his claim, but if he did ask for a judgment that would be no ground for appointing a receiver. The circuit court of this county in the case of *Duckworth v. C., H. & D. Ry. Co.*, 2 C. C. Rep., 518, in a very exhaustive and luminous opinion prepared by that distinguished judge, James M. Smith, has laid down the rules applicable to the appointment of receivers so fully and so thoroughly, that it seems to this court that nothing can be added to that very able opinion. Upon the authority of that case and for the reason that the allegations of this petition do not disclose that the plaintiff is entitled to the appointment of a receiver, it becomes the duty of the court to refuse such application, even though the defendant corporation, through its officers and counsel, join in the prayer of the petition and ask for the appoint-

ment of a receiver. The statutes of Ohio specify the cases in which a receiver may be appointed, but none of these grounds appear in the petition.

It is not the business of courts to conduct the business of corporations, partnerships or individuals, except in certain cases where it may be necessary for a short time to preserve the assets for the benefit of creditors, and in such cases it must be warranted by law or precedent to authorize the appointment of a receiver. The insolvency laws of this state afford ample protection for insolvent corporations or corporations in imminent danger of insolvency. The bankruptcy laws of the United States also afford ample protection for corporations which find themselves embarrassed or unable to prosecute their business. Courts of equity should not exercise the extraordinary power of appointing receivers except in the clearest cases and even then only when there is no adequate remedy provided by law. It must be remembered that the exercise of this extraordinary power of appointing a receiver by a court, which is in effect taking over all of the property of the corporation by the court itself, is an exercise of equitable jurisdiction, and it is an elementary principle of equity that courts of chancery will not interfere in any case where there is an adequate remedy at law. It has been the custom for failing corporations or corporations threatened with suits by creditors, to rush off to a court of equity, and secure the appointment of a receiver, thus putting itself under the protecting cloak of the court of equity to stave off its creditors and prevent them from realizing or attempting to realize on their claims through courts of law. No chancellor would be warranted in stretching the law to enable him to appoint a receiver for the convenience or accommodation of a corporation. He can not in justice read into the law that which is not there. Judicial legislation has been severely criticised by the people, and it is one of the grounds of complaint against our courts that they are continually, by judicial legislation, usurping the functions of the legislative branch of our government. There are cases in which it would be imminently proper to appoint a receiver pending the determination of some legal or equitable action which the plaintiff

iff is entitled to maintain, but the allegations of this petition do not disclose such a case. The sum and substance of the prayer of the petition is that a receiver be appointed, without asking for any legal or equitable relief. It has been urged by counsel both for the plaintiff and the defendant company that it has been customary in this jurisdiction to appoint receivers in cases where the facts were similar to those set out in the petition, and that without objection; and it is further intimated that such practice might be construed to mean according to the usages of equity as laid down in the sixth subdivision of Section 11894, General Code (5587, Revised Statutes). But it must be conceded upon reflection that no amount of practice of appointing receivers in unauthorized cases could ripen into a usage in equity, especially if the practice were confined to a locality and not general.

It is the duty of corporations to conduct their business through their boards of directors and managing officers, and if they fail to prosecute their business successfully in the manner provided by law, they should have no superior advantages over partnerships or individuals, but should be remitted to the same remedies as partnerships and individuals.

Creditors are entitled to have their claims paid, and if not paid the courts of law are open to them for the prosecution of their claims, and no court of equity should by the exercise of its extraordinary powers, interfere or attempt to interfere with the proceedings in courts of law, except in those cases in which by the ancient customs and usages of equity, the law was deficient or relief could not be afforded in courts of law.

In conclusion, therefore, the court is of opinion that there will be found no warrant of law and no precedent in equity where the question was fully considered, that would authorize the appointment of a receiver under the facts set out in the petition. For the reasons stated the application of the plaintiff for the appointment of a receiver will be refused.

**ACTIONS ON FIRE POLICIES COVERING THE
SAME PROPERTY.**

Common Pleas Court of Franklin County.

FRED H. SEIBERT V. CITIZENS FIRE INSURANCE COMPANY ET AL.

Decided, February, 1912.

Fire Insurance—Joinder of Causes of Action Against Different Companies—Carrying Policies on the Same Property—Not Permissible to Avoid a Multiplicity of Suits—Contracts of Insurance are Purely Personal and None the Less so where Loss is to be Proportioned—Section 11306.

Causes of action against different insurance companies, carrying separate policies on the same property damaged or destroyed by fire, can not be joined in the same petition even though the policy provides that the insurance company shall not be liable for a greater proportion of any loss on the property than the amount of the policy bears to the whole amount of insurance on the property.

Williams, Williams, Taylor & Nash, for plaintiff.

J. W. Mooney and R. M. Edmunds, contra.

KINKEAD, J.; BIGGER, RATHMELL, EVANS and ROGERS, JJ., concur.

The case was submitted upon demurrer to the petition for misjoinder of causes of action. Plaintiff unites causes of action upon two separate contracts of insurance made by plaintiff with two insurance companies upon the same property.

The petition in this case, and each cause of action thereof, contains the following averment:

“Plaintiff says that he effected other insurance on the above-described property to the amount of \$2,000 with the other defendants herein, German-American Insurance Company and German Alliance Insurance Company; that said policy issued by said defendant, Citizens Fire Insurance Company, specifically provided that permission was given in said policy for other insurance; that said policy issued by said defendant, Citizens Fire

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Insurance Company, provided therein that said company should not be liable for a greater proportion of any loss on the property above described than the amount of said policy issued by said defendants, Citizens Fire Insurance Company, should bear to the whole insurance upon said property."

It is urged in opposition to the demurrer that the above allegation justifies the joinder of the two causes of action against the different companies; that the joinder is proper because the contracts of insurance made by plaintiff with the German American Insurance Company and the German Alliance Insurance Company provided that the insured may obtain other insurance upon the property, and because each of the policies contains the provision as to proportionate liability.

The court on a previous hearing overruled the demurrer and held that the causes were properly joined.

This conclusion was at variance with the decision of Bigger, J., in *Superior Mantle Co. v. Underwriters Mutual Fire Ins. Co.*, 4 O. L. R., 432 (17 O. Dec., 118). Upon application a rehearing was granted and the question has been re-examined by the writer of this opinion. And upon request of counsel and because of the importance of the question as a rule of practice, the matter was taken up and considered by all the members of this court. The concensus of opinion is that the rule of decision by Bigger, J., in case above cited should be adhered to, and the demurrer to the petition for misjoinder of causes is, therefore, now sustained.

The ruling previously announced permitting the joinder was based upon the precedent established in *Fegelson v. Insurance Co.*, 94 Minn., 486, and *Pretzfelder v. Insurance Co.*, 116 N. C., 491, which sustain the right of joinder in such cases. The reasons upon which these two courts sustain the joinder appeals strongly to one's sense of justice, resulting in the settlement of the loss sustained in one trial, where practically the same evidence, and possibly the rules of law may be the same. The grounds upon which the decisions are based are because the contract with each company contains the provision that the

plaintiff's right of recovery against each is limited to the proportion of the loss which the amount named in the policy of each company should bear to the whole amount insured; and because by a separate action on each policy the same proposition of law would arise and the same evidence would be gone over in the different cases, adding costs, and at needless consumption of the time of the courts. These decisions argue also that there is no method to gauge accurately the *pro rata* loss of each company so readily as by one verdict and one apportionment according to the varying amount of risk taken by each company. It is said that:

"By their stipulation to apportion the loss the company have to that extent at least, made the five policies one contract, the amount of damages accruing upon which should be assessed and apportioned in one joint action."

In the Minnesota decision it is considered that the joinder is proper because it is necessary in order to determine the amount which plaintiff is entitled to recover against each defendant, to determine conclusively as against each company *two questions* in which there is a *community of interest* among all the defendants, namely, the amount of the plaintiff's loss and the amount of his valid insurance upon the property lost or damaged by fire. It is considered that if the insured can not bring all the companies into one action, and have these questions determined as a basis for accurately and conclusively ascertaining the *pro rata* liability of each insurer for his loss, he is without any certain, speedy, adequate and convenient remedy, and he is remitted to the uncertain remedy of a multiplicity of suits. The remedy by separate suits is claimed to be neither certain nor adequate, depending upon the aggregate result of a multiplicity of vexatious actions.

In the North Carolina case the court considered that "By their stipulation to apportion the loss the companies have to that extent at least made the five policies one contract, the amount of damages accruing upon which should be assessed and apportioned in one joint action."

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The complaint in the case of *Fegelson v. Insurance Co.*, 94 Minn., 486, prayed that the court will ascertain the facts and the amount of the plaintiff's loss, and the proportionate share thereof of each defendant, and award judgment accordingly. The parties evidently were endeavoring to make the causes of action equitable in nature.

Such a conception of a case of this kind when properly presented by a petition in that form finds favor with some of the members of this court.

But the joinder of causes of action in equity are to be measured by the same tests as those at law. And the violation of each primary contractual right gives rise to separate causes of action, and causes of action for the violation of separate contractual rights can not be united in the same petition, unless they come within the statute and arise out of the same transaction, or are connected with the subject of the action.

The Minnesota decision, however, contains a quotation from *Pomeroy's Eq. Jur.*, Section 269, to the effect that: "courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction (to prevent multiplicity of actions), where the individual claims were not only legally separate, but were separate in time, and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all claimants in the question at issue and in the remedy."

This decision concedes that the *pro rata* liability provision does not make the liability of the respective companies a joint one, and that the liability of each is several, to be determined by the terms of its own contract (94 Minn., 488; *Bardwell v. Conway*, 118 Mass., 465; *Hanover v. Brown*, 77 Md., 64). But it is insisted that the fact of separate liability is not decisive of the question, but that the community of interest by reason of the *pro rata* clause constitutes a well recognized exception to the general rule that several causes of action can not be united to enforce separate liability of several defendants. The same view was taken in *Virginia-Carolina Chemical Company v. Home Ins.*

Co., 113 Fed., 1, where it was held that equity has jurisdiction, on the ground of inadequacy of remedy at law, to enjoin separate actions by insured against several insurers, and have their liabilities determined under the bill, their defenses being the same, and their liabilities if any, proportioned. Of similar effect is *City of Alberta v. Nielson*, 83 Minn., 246.

But a question of equitable intervention by a bill to enjoin the pursuance of separate actions at law against parties having a common right, or a community of interest in the subject-matter of the controversy, is materially different from that presented by the demurrer in this case.

I find the precise question has been decided in favor of the joinder in *Grasser & B. B. Co. v. Insurance Co.*, 2 N.P.(N.S.), 125, by Pugley, J., Lucas county.

But the reasons advanced by the decision upholding the joinder as above outlined lead one away from an accurate and logical analysis of the cause of action, and in determining the propriety of joinder it must be determined accurately what the transaction is which gives rise to the causes, and what the subject-matter thereof is. Whether the separate causes be legal or equitable when joined they must pass the tests of the statute. The petition in this case does not present a question whether a remedy may be pursued in a way suggested by the authorities cited. In the former decision in this case I endeavored to reason that the community of interest between the different companies, on account of the provision in the policies that the liability was made proportionate to the total amount of insurance which the insured had upon his property, brought the different contracts of insurance within the *same transaction*, or that they were connected with the *subject of the action*.

Furthermore I endeavored to justify the joinder by the thought that a cause of action on a contract of fire insurance consisted in the statement of so much of the terms of the contract as were relevant, the existence of the property, and the loss. Then as there was a community of interest on the part of the insurers, and as the liability of each was contingent upon

the total insurance, the same facts, to-wit, a description of the property, and the facts relating to the loss sustained, it seemed that the transaction of the one contract of insurance was in some way connected with the subject of the action.

I confess that my mind was never fully satisfied with the analysis because it was somewhat strained, and something seemed lacking. So I yield deference to the precedent already established by this court in the case cited, and state in support thereof the reasons now appearing in this opinion. It is more in accord with the usual understanding of the meaning of the statute with reference to joinder. And it is consistent with the principle expressed in *Good v. Ins. Co.*, 43 O. S., 394, to the effect that the provision in the contract making the liability contingent upon the proportion loss which the amount of insurance bears to the whole sum insured on the property, does not affect the separate or several liability of each company.

It is true that early interpretations of the provision as to joinder disclosed that the terms "same transaction," and "subject of the action" were used with a view of making a broad and comprehensive provision for the joinder of causes in the interest of justice, and for the avoidance of multiplicity of actions. The paramount idea is to litigate all causes in one action, which may legitimately be done to avoid a multiplicity of actions.

A transaction is an act or occurrence giving rise to a right of action on the part of one person to assert a claim for relief against another. The transaction is a contract of insurance made between the parties which gives rise to an obligation on the part of one, and a right in favor of the other with reference to the object thereof—the property. The contract between insured and insurer is personal and individual, and the right and obligation is evidenced by the written instrument. The transaction between the parties is purely personal and is none the less so, even though the policy provides that each company shall not be liable for a greater proportion on any loss on the property than the amount of each policy bears to the whole insurance on the property. This provision does not destroy the in-

dividuality of the contract and does not necessarily embrace or include another separate contract of insurance with another insurance company even upon the same property with a contractual obligation of proportionate liability dependent upon the total amount of insurance upon the same property. The transaction between the insured and the insurer is the making of a personal contract covering the loss of the property of the insured. The loss of the property of the insured is the object of the contract, while the transaction which takes place between the parties is the making of the contract, and the subject-matter thereof is the contract.

A cause of action on a contract of insurance with one company for loss by fire, and a cause of action against another company upon another contract of insurance against loss of the same property which is insured by the first contract of insurance, can be considered as a transaction connected with the subject of the action on the first policy by the company first insuring the same property, *only upon the ground* that the second contract on the same property contains a provision that the guaranty against loss is made dependent upon the extent of the insurance and liability of the first company in the proportion that the contract of guaranty and loss bears to the total amount of insurance and the total amount of loss by fire of the same property.

But the transaction between insured and insurer is the making of a personal contract of insurance. The loss of the property of the insured is the object of the contract, while the transaction which takes place between the parties is the execution of the contract and the subject-matter thereof is the contract. The fact that the contract makes the obligation of the insurer proportionately dependent upon the amount of total insurance taken upon the object of the contract—the property insured—does not necessarily make the identity of transaction between insured and insurer the same, nor is the subject-matter of the cause of action which the insurer has against the insured for loss sustained by the former, identical.

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The conclusion, therefore, is that the demurrer for misjoinder will be sustained, and leave is allowed to amend the petition.

DILLON, J., concurs in the conclusion reached, in so far as the action is attempted to be maintained as an action at law, but is of opinion that by an action in equity all insurers may and ought to be joined.

**LIENS IN FAVOR OF SUB-CONTRACTORS AND
MATERIAL MEN.**

Common Pleas Court of Hamilton County.

HENRY NIEMES V. CHARLES J. CLOSE ET AL.*

Decided, June 7, 1909.

Mechanic's Liens—Liability of Owner to Sub-Contractors—Where Principal Contractor Was Paid Prematurely—Advance Payment Treated as in Collusion and Fraud—Section 8335.

Where payment is made by an owner to a principal contractor before the work is completed and before payment was due under the terms of the contract, and such payment was not made to enable the principal contractor to complete the work, but was made solely for his accommodation, it is invalid as against the rights of sub-contractors and material men who subsequently completed their liens within the time required by law, and as to them the fund will be treated as still in the hands of the owner, and the liens of sub-contractors and material men will attach thereto to the extent of their claims.

* A memorandum filed in this case in the circuit court on February 4, 1911, reads: "We think the judgment of the court of common pleas in this case should be affirmed on the authority of *Bullock v. Horn*, 44 O. S., 420." Judgment of circuit court affirmed by the Supreme Court without opinion October 17, 1911, *Herrmann et al v. Niemes et al*, 85 Ohio St., —.

Hoffman, Bode & LeBlond, Jos. W. O'Hara, William Littleford, Wm. Hartley Pugh, James J. Muir, F. E. Niederhelman and Morse, Tuttle & Harper, for various lienholders.

Jonas B. Frenkel, contra.

GORMAN, J.

This cause by agreement of counsel is submitted to the court without the intervention of a jury and involves the questions of the validity and amount of certain mechanics' liens on the funds of Charles J. Close, the contractor for the construction of the western pumping station under a contract with the commissioners of water works of the city of Cincinnati, in 1906 and 1907. All the liens have been proved or admitted as to amount, and that the notice required by the statute to give the sub-contractors and material-men a lien on any fund belonging to Close under the contract were duly and properly given, as provided by law.

The only question to be determined is whether or not the last payment made to Close by the commissioners of the water works on February 5th, 1907, of \$9,046.31 was made contrary to the provisions of the lien law of Ohio (Section 3203), and in fraud of the rights of the sub-contractors and material-men. It is admitted that this payment was made before the work of Close was fully completed, and before the same was due under the terms of the principal contract. (Close's contract with the commissioners of water works.)

It is not claimed that this payment was made to enable Close to complete the work, and therefore a payment which might be held to have been made in good faith.

According to the testimony of Mr. Benzenberg, the engineer of the commissioners of water works, and a letter to him from Mr. Close a short time prior to this payment, it was made solely for the accommodation of Mr. Close.

Close's contract provided that "When the entire work is completed and after it shall have been accepted by said trustees (of water works), a final payment shall be made upon a certificate of the chief engineer," etc. It further provided that 15 per cent. of the contract price should be retained until the final completion of the work.

In violation of these express provisions of the contract, and in advance of the time when it was due under the contract, the commissioners of water works paid Close this last payment of more than \$9,000, retaining but \$2,000 to complete the work, and nothing to pay sub-contractors and material-men who might desire to file liens before the last payment was due under the contract.

I am of the opinion that the commissioners of the water works could not legally do this as against the rights of the sub-contractors and material-men who subsequently perfected their liens within the time required by law. I believe this conclusion is fully supported by the decision of the Supreme Court in the case of *Bullock v. Horn*, 44 O. S., 420.

Note the language of Judge Spear found on pp. 424 to 429, and I would especially call attention to the following language on page 428, where he is discussing the construction to be given to Section 3203, Revised Statutes, as it then stood upon the statute books:

“It would seem not unreasonable to claim from the language of this section (3203) (then 3204) that, as to advance payments, the owner may not make them simply to accommodate the contractor, or even to accommodate himself, but that the advance payments allowed and described as not fraudulent or collusive, being one made in good faith, in order to complete the contract, a payment made in advance, for any other purpose, would not avail the owner as against the workman or material-man, but as to them would be held to be fraudulent and collusive.”

While the court was not called upon and did not construe Section 3203 (then 3204), the above language indicates clearly what the court thought of advance payments. There are other expressions of the court throughout the report equally as strong in support of the claim that the owner can not, except in good faith and to complete the work, make payments in advance of the time they are due under the contract so as to affect the rights of sub-contractors and material-men. Since the decision of *Bullock v. Horn*, the Legislature has amended Section 3203 (then 3204) by eliminating the provision permitting payments to be made in advance in good faith to complete the work, and it would

seem therefore, that even such payments would not now be countenanced by the courts under Section 3203 as it now stands. See also *Walsh v. McMenemy*, 74 Cal., 356; *Merritt & Allen v. Haskins*, 96 Iowa., 652; *Green Bay Lumber Co. v. Adams*, 107 Iowa, 672; *Insurance Co. v. Shedd*, 16 App. Cas. (D. of C.), 150.

But the court is cited by counsel for the commissioners of the water works to the unreported case of *Hayes v. Locke*, 33 Bull., 228, as overruling *Bullock v. Horn*.

It is very unsafe and unsatisfactory for the court to follow an unreported case, unless it be made clear upon what grounds it was decided. Furthermore, from extracts taken from the record by counsel and submitted to me it would seem that the case turned upon the question of whether or not the advance payments in that case were made in good faith and to complete the work. The court below apparently found that they had been made for that purpose.

I am of the opinion that the last payment of \$9,046.31 made to Close, the heard contractor, is to be treated as still in the hands of the commissioners of the water works, available for the liens, where it would and should have been when the liens were filed, if the contract had been complied with as these sub-contractors and material-men had a right to expect it would be. The amount which the commissioners were obliged to pay out to complete the work (about \$960) was properly paid out.

The liens of the sub-contractors and material-men will attach to the balance in the hands of the commissioners of the water works, or now in the hands of the clerk of this court, and on the further sum of \$9,046.31 constructively in the hands of the city of Cincinnati, or the commissioners of water works. If there be not sufficient to pay all the sub-contractors and material-men in full, they will *pro rate* among themselves as the statute provides.

Let a decree be drawn in accordance with this finding.

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**ACQUISITION OF RESIDENCE FOR PURPOSE OF APPLYING
FOR A DIVORCE.**

Court of Insolvency of Hamilton County.

MICHAEL A. BOWEN v. CORA M. BOWEN.

Decided, December, 1911.

*Divorce—Determination of Residence—Loose or Liberal Construction of
Statutes Conserving the Marriage Relation Not to be Permitted—
Actual Residence Necessary to Acquire Domicil.*

1. The fact that a former resident of Cincinnati, who became connected with the Government service in Washington, has been accustomed to return to Cincinnati to vote, is without significance in determining his domicil in a divorce proceeding.
2. Domicil in Ohio, for the purpose of obtaining divorce, can be acquired only by absolutely abandoning the former residence outside of the state.
3. One who had resided for twelve years in Washington, D. C., came to Cincinnati, Ohio, and rented a furnished room which he occupied for a few days in succession at intervals during the year. When not occupying this room he lived with his wife and family in Washington and he accompanied them on a three months European tour. After the lapse of a year he filed a suit for divorce in Cincinnati, claiming statutory residence in this state.

Held: That his residence in Washington was not abandoned at the time of the attempted transfer of his domicil to Cincinnati, and he has not acquired a residence in Ohio within the meaning of the divorce statutes.

W. C. Mardorf and Wm. J. McCauley, for plaintiff.

J. W. Heintzman and D. B. Howard, contra.

WARNER, J.

On May 17th, 1911, the plaintiff filed his petition for divorce against the defendant in this court, alleging residence required by statute.

In her answer the defendant denies that the plaintiff was a resident of this state and county at the time said petition was filed, and alleges that he was then and still is a resident of Washington, D. C. The jurisdiction of the court is thus brought in question.

The terms "resident" and "*bona fide* residence," as used in the statutes on divorce (Section 11980 of the General Code of Ohio) have uniformly been construed by the courts in this country as meaning domicil. *Bishop on Marriages and Divorce*, Section 209, and citations, *Nelson on Divorce*, Section 41.

Bouvier defines domicil as "that place where a man has his true, fixed and permanent home, and principal establishment, and to which when he is absent he has the intention of returning." It has been held by the courts that domicil is "the place where a person lives, or has his home, to which when absent from it he intends to return, and from which he has no present purpose to remove." *Keezer on Divorce*, Section 197, and citations. In *Bishop on Marriages and Divorce*, Section 118, the author declares that "domicil is the place in which, both in fact and intent, the home of a person is established, without any purpose to return to a former home."

In *Nelson on Divorce*, Section 40, it is declared that "the domicil of choice requires an actual residence combined with an intention to so reside for an indefinite time."

The authorities all agree that *mere residence* is not sufficient; that intention without sufficient acts to support it is not controlling; that change of residence must, to constitute new domicil, be with the *animus non revertendi*; that wherever one goes the *animus manendi* must exist, not ostensibly but really; and that a person can not have two domicils at the same time, but is presumed to continue the old, until a new one is clearly acquired.

The plaintiff claims that his domicil was changed from Washington, D. C., to Cincinnati, in April, 1910. Previously for some twelve years he had resided in Washington with his wife and children, and at the time he came to Cincinnati to establish a residence was interested in business in the former city and is still.

The fact that he was in the employ of the Government when he removed to Washington and has since returned to Cincinnati to vote at nearly all elections is of no significance upon the question now raised. Citizenship for the purpose of exercising the right of suffrage is quite a different thing from domicil in matters of divorce. When the plaintiff came to Cincinnati in April,

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1910, he rented a furnished room which he has retained until the present time; stated to acquaintances that it was his intention to make Cincinnati his home; made some inquiries about business openings there and at other times when in Cincinnati; and remained at that time about ten days. He was back in Cincinnati for a few days in June and November, 1910, and in February and May, 1911.

He returned to Washington in April, 1910, and lived, at least a part of the time with his wife and family at an apartment house called The Frederick, as clearly shown by the evidence of his daughter and tenants of The Frederick. In the summer he went abroad, taking his wife with him, for some three months. On their return the apartments at The Frederick were again occupied by them. He left very soon and one witness states that she was there when he was packing his things to go, and narrates conversation with him about his going so soon after his return from Europe. He probably had a room in Washington in another part of the city which he occupied at times. He testifies that he was trying to close out his business interests there, but had not done so as yet. As a side light on the question of domicile, it appears that in the latter part of 1909 he brought suit for divorce against his wife in the courts of the District of Columbia, on the ground of adultery; that such suit was amicably adjusted and dismissed upon certain conditions which he claims she subsequently violated and which seems to have been the source of much friction in their subsequent marital life. It also appears that he was greatly attached to his two daughters one of whom was afflicted with a serious disease, and both of whom have never resided apart from their mother.

Upon these facts and principles of law applicable thereto, did the plaintiff acquire a domicile in this state and country in April, 1910, and was he a *bona fide* resident of Cincinnati and Hamilton county when the suit was instituted? I think not.

In order to abandon and discontinue his previous domicile in Washington, it became imperatively necessary that he should absolutely sever all marital and home relations with his wife, and never resume the same. This he did not do, but on the contrary he did occupy the apartments at The Frederick with his

wife and children subsequent to his visit to Cincinnati in April, 1910, for a time at least, and did in the summer of that year take a European trip of about three months with his wife, and on their return was again at The Frederick with his family for a brief space. It is apparent that his personal belongings remained at the family residence where he was packing to leave shortly after the return from Europe.

His stays in Cincinnati, the few times he was here, were so short, and his renting a furnished room that he rarely occupied so peculiar, that taken in connection with his continued subsequent marital relations with his wife, the conclusion is compelled that he had come here solely for the purpose of obtaining a divorce, and not with any clear intention of changing his domicile at that time. Whatever may have been his intention, his acts conclusively rebutted any change of domicile.

It has been held that where a person spends part of his time in one state, and the other part at his home in another, and where he has no business in the former, but seems to be gaining a residence for the purpose of divorce only, he is not a *bona fide* resident. *Albee v. Albee*, 43 Ill. App., 370.

The public is interested in the proper administration of the laws affecting marriage and divorce, and it would be intolerable to permit any loose and liberal construction of our statutes, adopted to protect and conserve the marital relations of our people, to be used by any one not a *bona fide* resident of the state for the mere purpose of obtaining a divorce.

The petition will be dismissed for want of jurisdiction, at plaintiff's costs.

APPROPRIATION OF LAKE FRONTAGE DEVOTED TO PARK PURPOSES FOR RAILWAY PURPOSES.

Common Pleas Court of Cuyahoga County.

JOHN G. WHITE v. CITY OF CLEVELAND, DETROIT & CLEVELAND NAVIGATION CO. AND CLEVELAND & BUFFALO TRANSIT CO.; AND THE CLEVELAND & PITTSBURGH RAILROAD CO. v. CITY OF CLEVELAND, THE DETROIT & CLEVELAND NAVIGATION CO. AND THE CLEVELAND & BUFFALO TRANSIT CO., AND TWO OTHER CASES.*

Decided, May 8, 1911.

Eminent Domain—Fee to Land Appropriated for Park Purposes Not Obtained by Municipality, When—Interest Obtained Determined by Statute, Not by Measure of Compensation—Municipality May Sell or Lease Only Property Held in Fee—Use for Park and for Wharf Purposes Distinguished—Additional Servitude without Further Compensation May Be Enjoined—Tax-Payer Can Not Enjoin Lease for Wharf of Property Condemned for Park Purposes—Riparian Ownership and Governmental Interest Distinguished—Injunction Does Not Lie to Prevent Change in Use of Property Appropriated—Sections 3677, 3681 and 3698.

1. A municipality in appropriating lands for park purposes, in 1872, by virtue of Section 507 of act 66 O. L., 234 (R. S., 2232; General Code, 3677), limiting the amount taken to that "reasonably necessary for the purpose to which it is to be applied," did not obtain the fee thereof, notwithstanding the fee therein was prayed for; and it follows that upon lease of part of said property for exclusive wharf purposes, the reversioners are entitled to additional compensation for the increased servitude as one not contemplated in the original condemnation proceedings.
2. The interest acquired by condemnation proceedings is determined by the provisions of the statute, and not by the measure of compensation allowed therefor. A written statement was filed by a property owner in condemnation proceedings for municipal park purposes, under Section 513 of act 66 O. L., 236 (R. S., 2236; General Code, 3681), setting forth that he was the owner in fee of one parcel, is not such an answer as is required by statute, raises no issue, and can not, upon the property being devoted to other than the use appropriated, be deemed an admission of the interest taken, or estop such owner from denying title in fee in the municipality.

* Affirmed by the Circuit Court, *White v. City of Cleveland*, 14 C.C. (N.S.), 369.

3. Section 676 of the municipal code of 1869 (R. S., 2673; General Code, 3698 *et seq.*), authorizing sale or lease of municipal property, does not apply to lands in which the municipality has an easement only, acquired by reason of exercising the governmental powers of the state.
4. Wharf use of land with the exclusive right to construct and use piers, passenger station, ticket offices, freight warehouse, railroad tracks, etc., necessary for a lake transportation company, is a separate and distinct use from that for park purposes, notwithstanding the declaration of council that such wharf use is not inconsistent with park use. The latter use implies recreation purposes merely; the former, commercial purposes.
5. Injunction lies to prevent the imposition of the additional servitude for wharf purposes upon land appropriated for park purposes, pending determination of compensation for the new use, notwithstanding a reversioner, by acquiescing in the appropriation, may bring his action for damages.
6. A tax-payer can not enjoin a municipal corporation from leasing for wharf purposes land condemned for park uses, the former use not being a diversion to another inconsistent use, and with no intention to abandon such park use.
7. The title of the state and of municipalities to land under the water of Lake Erie is not that of a proprietor, but it is held in trust by them for public purposes of navigation and fishery. Riparian ownership embraces all such facilities and instrumentalities as will further navigation and fishery purposes, and includes access to navigable water and the right to wharf out to it. The fact that a municipality has used public funds for piling, and for filling in submerged land for park purposes, does not defeat the right of reversionary riparian owners in such lands.
8. Injunction will not lie to prevent a municipality from condemning lands in which it has an easement only, but in which it sought to obtain the fee as authorized by General Code, 3692, the necessity for obtaining such lands being wholly within the discretion of the council thereof; hence, where the declared purpose in condemning land for public purposes is wise and lawful, condemnation will not be enjoined, unless the evidence shows clearly that the declared purpose is not the real purpose. Evidence of negotiations by city officials other than members of council is admissible to determine the real purpose of council in passing a resolution and ordinance condemning lands for a public purpose, the declared purpose being traversed as not the real purpose.

J. G. White, for J. G. White.

Newton D. Baker, for city.

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Goulder, Holding & Masten, for C. & B. Transit Co. and D. & C. Navigation Co.

Squire, Sanders & Dempsey, for C. & P. Railroad Co.

CHAPMAN, J.

The four cases have been submitted to the court for determination. Nos. 114477, 117638, 121677 and 121676.

The first two cases seek to enjoin the city and the defendants, the Detroit & Cleveland Navigation Company and the Cleveland & Buffalo Transit Company, from entering into and carrying out the terms of certain alleged leases entered into by the city of Cleveland and the boat company defendants, November 15, 1909, and May 31, 1910.

In the first of said cases the plaintiff bases his right as a taxpayer, and claims that the proposed leases will be a diversion by the city of certain parts of what is known as Lake View Park from the purposes to which it was originally appropriated.

In the second case, the plaintiff, the Cleveland & Pittsburgh Railroad Company, seeks to enjoin the same leases, and bases its right upon the ground that it has some reversionary interest in said park property, particularly the portion thereof sought to be leased to the defendant boat companies.

The third of the cases submitted is brought by plaintiffs as tax-payers to enjoin an appropriation of the fee for park purposes, under an ordinance passed by the city council of the city of Cleveland, November 14, 1910, appropriating the reversionary interests of the original owners of the park, alleging that the declared purpose thereof is not the true purpose, but that the true purpose is to enable the city to transfer about thirty-five acres of land in Lake View Park to the railroad companies for the purpose of erecting thereon a depot.

The fourth suit has for its object a similar purpose, but is brought by the same plaintiffs as reversionary owners of rights in the original lands appropriated for the park.

From the evidence in the case, it appears that on July 9, 1872, the city council passed the following resolution:

“Resolved, by the city council of the city of Cleveland, that it is deemed necessary and said council does hereby declare its intent to take and appropriate for park purposes, the follow-

ing described property within said city, to-wit: all the property between the southerly line of the right-of-way of the Cleveland & Pittsburgh Railroad Company and a line commencing on the westerly line of Erie street 327 feet 6 inches north of the northerly line of Lake street and extending to Seneca street to a point 346 feet north of the northerly line of Lake street; also, all the property north of the right-of-way of the Lake Shore Railway Company, and between Erie and Seneca streets, same to be used for park purposes."

That afterwards, on September 24, 1872, the solicitor of the corporation filed an application in the probate court to appropriate the property described in the foregoing resolution, and further states as follows:

"The undersigned, the city solicitor of the city of Cleveland, and here appearing for and in behalf of said city, respectfully represents that said city of Cleveland is a municipal corporation and a city of the first class, that it did by action of its council on July 9, 1872, adopt by a vote of all the members of said council present at the meeting and more than two-thirds of all the members of the council upon which vote the ayes and naves were called, the following resolution, to-wit: Resolved by the city council of the city of Cleveland that it is deemed necessary and said council does hereby declare its intent to take and appropriate for park purposes, the following described property within said city, to-wit, all the property between the southerly line of the right-of-way (description of property). * * * Also all of the property north of the right-of-way of the Lake Shore Railroad Company and between Erie and Seneca streets, the same to be used for park purposes. The undersigned states that the object of said condemnation and appropriation is and was to secure to said city the title absolute and in fee and clear of all incumbrance, of said described property that the same may be used for park purposes. * * * Whereupon the undersigned in the name and on behalf of the * * * of Cleveland in order to accomplish the purposes and interest of the resolution by said city council as aforesaid files this application as by law required and asks that the interests of the same above named parties to the property described with the value thereof be determined by a jury and that by the payment of said value so found by said jury to said parties by said city all the rights of title, equities and easements of the parties aforesaid in and to said parties, be appropriated by and become vested in the city of Cleveland in accordance with said resolution and the statutes in such cases made and provided."

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That thereafter such proceedings were had in the probate court that the said property owners were awarded the sum of \$204.028 for the land between Summit street and the Cleveland & Pittsburgh Railroad Company's right-of-way, \$30,375 for the land north of the Lake Shore & Michigan Southern Railway Company's right-of-way extending to the shore of Lake Erie. And the court decreed that upon payment of the sums awarded to the several parties defendant, the said city is authorized to take possession of the premises for the uses and purposes for which the same was appropriated. The city took possession of said lands, and paid for them by the proceeds of bonds which were issued for the purpose of raising a fund to pay for a park, and these bonds were subsequently paid from the proceeds of levies of taxes made by the city to pay for land appropriated for park purposes. The said lands were improved and beautified by moneys arising from general taxation.

About the year 1894 the city, by ordinance authorizing it, began certain improvements in front of and extending into the waters of Lake Erie from the shore of the park, the first authorized improvement being an extension by way of piling and rip-rap work, to extend Erie street into the lake; and in 1896 it authorized the setting of a row of piling extending westerly from Erie street and in front of the shore line. Thereafter the Erie street extension was further extended into the lake, and at a point about 715 feet southerly from the harbor line a row of piling was set extending to the westerly line of Seneca street prolonged northerly. Two piers were built, one as an extension of Erie street out to the harbor line from this line of piling, the other a pier 200 feet westerly and 100 feet in width, extending also out to the harbor line. That behind the latter row of piling, and extending to the shore and from the shore to the piling, has been made certain land, the whole surface of the soil under the lake having been filled up from the original shore line to the piling, so as to form a solid parcel of ground above the surface of the water of the lake.

That in 1898, at the request of the city council, the government established the above mentioned harbor line, which is approximately 1700 feet from the original shore line of the lake. The filling in was practically all done by the dumping of refuse,

excavations from cellars, streets and sewers, and with very little expense to the city.

On November 18, 1909, the council of the city of Cleveland passed an ordinance, No. 16,355, entering into a lease between it and the said defendant boat companies for the westerly of the two piers above mentioned; and on May 31, 1910, again entered into a similar lease ratifying and confirming the terms of the former lease to the defendant companies. By the terms of the latter lease it was provided that the city leased said pier to the defendant boat companies for the period commencing with the acceptance of the terms of the ordinance and ending December 31, 1909, at a rental of \$55,000 for the entire period, to be paid by the lessees; the lessor to erect a suitable bridge over railroad tracks, pave certain approaches, and to provide a right-of-way and material and labor to construct a switch track from the pier leased to and connecting with the railroads, furnish water and lighting facilities, and permit the lessees to widen the pier to the width of 300 feet. Lessees were given the right to construct upon the said pier a passenger station, ticket offices, freight warehouses, and such railroad tracks as shall be necessary for the use of the pier as a suitable place for landing, and the transaction of package freight and passenger business. Section 3 of the agreement of lease provided that the city council may terminate the lease two years from January 1, next after giving a notice of its intention so to do. In such event the city is to repay to the lessees the amounts expended by them for their improvements, upon certain terms provided in the ordinance. By Section 7 it is provided that the lessees shall have full control of the pier, and shall have the right to restrict access thereto in such manner as to facilitate and accommodate their business. The lessor further covenants that it will not construct any pier west of the pier leased nearer than 300 feet of said leased pier when widened as provided in the lease.

The latter ordinance was passed after the enactment by the Legislature of Ohio of General Code, 3699-1 (101 O. L., 236), and recites that fact within its provisions.

I will first consider the question involved in the suits seeking to enjoin the city and the boat companies, defendants, from carrying out the terms of the proposed lease.

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The first question presented for determination is, what estate or interest was acquired by the city in the land appropriated under the proceedings of 1872? In this state it seems to be settled that unless the statute expressly authorizes the taking of the fee, no greater estate or interest is taken by the appropriation than is reasonably necessary for the full and complete enjoyment for the purpose for which it is taken. The extent of the interest taken must be determined from the language of the statute authorizing the appropriation. Unless the fee be expressly authorized to be taken, the interest taken will be limited by the public necessity. The leading case upon this point in this state seems to be *McCombs v. Stewart*, 40 Ohio St., 647. At page 665 the court say:

"But, whether the property taken is paid for in money or in accruing benefits and advantages, it should clearly appear by the terms of the act that it was the legislative intent to take a fee before such effect can be given to it. In the absence of express words, a fee will not be deemed to be taken where the purposes of the act will be satisfied, as in the case at bar, with the taking of an easement."

And again, in *Vought v. Railway*, 58 Ohio St., 123, in paragraph 5 of the syllabus, the court states the general rule thus:

"Where lands are acquired for a public use, an easement only is taken therein, unless the taking of a greater estate, as a fee simple, is expressly authorized by law."

Similar language is found in *Corwin v. Cowan*, 12 Ohio St., 629; *Malone v. Toledo*, 28 Ohio St., 643; and in *Newton v. Railway*, 115 Fed. Rep., 781.

At the time of the appropriation of the lands described, in 1872, Section 507 of the municipal code, Chapter 47, p. 234, provided:

"Each city and incorporated village shall have the power to appropriate, enter upon and hold real estate within the corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied. * * * 10. For public parks."

"Section 509. The terms land and real estate, as used in this chapter, shall be regarded as including rights and easements of an incorporeal nature."

Section 512 provided the procedure by which the council might appropriate private property, providing that same shall be done by resolution declaring such intent, defining therein the purpose of the appropriation, and setting out a pertinent description of the property to be appropriated.

Section 513 provided that, upon the passage of a resolution, an application should be made to the probate court, which application "shall describe as correctly as may be the property to be taken, the object proposed, and shall name the owners of the property."

It will be observed that by Section 507 the right to take a fee is not expressly given; in fact it provides, "But no more shall be appropriated than is reasonably necessary for the purpose to which it is to be applied."

In the appropriation proceeding on October 14, 1872, the Cleveland & Pittsburgh Railroad Company, the plaintiff in one of the suits now under consideration, filed in the probate court, in said action, a paper endorsed, "Claim of the C. & P. Railroad Company." This paper was in the following language:

"The State of Ohio, Cuyahoga County, in Probate Court.

"The City of Cleveland v. J. M. Jones et al. Appropriation.

"The Cleveland & Pittsburgh Railroad Company, one of the defendants herein, represents that it is the owner in fee of certain lands situated between Wood and Erie streets in the city of Cleveland, and south of its right of way, 396 feet in width, and the land north of the right of way of the Lake Shore & Michigan Railway Company of 528 feet in width, as designated on the map attached to the petition in this case, and which is sought to be appropriated herein, for which this defendant claims damages in the sum of Thirty Thousand (\$30,000) Dollars.

"R. P. RANNEY,

"Attorney for said Company.

"(Endorsed): City of Cleveland v. J. M. Jones et al. Claim of the Cleveland & Pittsburgh Railroad Company. October 14, 1872. Ranney."

It has been urged that, by reason of the filing of this paper, the Cleveland & Pittsburgh Railroad Company is estopped to deny that by the appropriation proceedings a fee was taken; or that this paper is an admission on the part of the railroad company that a fee was taken in the proceedings.

This original appropriation proceeding was brought to appropriate twenty-one different parcels of land, of which the Cleveland & Pittsburgh Railroad Company owned one; and the order of the probate court was the same in respect to all of the parcels.

I think that the fact that the Cleveland & Pittsburgh Railroad Company filed this paper in the proceedings in the probate court can not enlarge the interest which the city was authorized by the statute to take. Nowhere does the statute provide for such an answer in an appropriation proceeding; and such a paper, if filed, raises no issue (*P. C. C. & St. L. Ry. v. Greenville*, 69 Ohio St., 496). Nor does the fact that the resolution and application state that a fee is sought to be taken enlarge the power of the municipality (*State v. Sheltry*, 100 Minn., 107). It could not well be said that, in a proceeding in which there were twenty-one or more defendants, and twenty-one parcels of land appropriated, the title obtained as against the owner of one parcel differed from that obtained from the owners of other parcels in the same proceeding. While it is probable the owners of the property appropriated were compensated in the full value of the property, yet the court can not say—and there is no evidence—that they received value for anything other than the interest appropriated in the proceeding. The interest taken is determined by the provisions of the statute, and not by the measure of compensation allowed for the interest.

It is argued that, under Section 199, Chapter 15, of the municipal code of 1869 (66 O. L., 182), the city of Cleveland, at the time of the appropriation, under paragraph 32, had power “to hold and improve public grounds and parks, and provide for the protection and preservation of the same”; and, under paragraph 33, “to appropriate private property for the uses of the corporation”; and, under paragraph 34, “to acquire, by purchase or otherwise, and hold real estate or any interest therein, and other property, for the uses of the corporation, and to sell or lease the same.”

From this section it is argued that the city had authority, at the time of the appropriation proceedings in 1872, to sell or lease the lands appropriated. It would seem that the authority to sell or lease, as provided in paragraph 34, did not apply to

lands appropriated under Section 35, but to those acquired in the manner provided by paragraph 34. In fact it is doubtful whether it would apply to all lands which might be acquired within the provisions of paragraph 34, as the paragraph in its terms includes dedicated property. It seems to me, therefore, that these sections do not enlarge the powers of acquisition provided in Section 507.

It is further argued that Section 676, Chapter 54, of the municipal code of 1869 (66 O. L., 264), authorizes the city to lease or convey any real estate or interest therein, any wharf or public landing * * * public ground or park, belonging to the corporation.

I am of opinion that, taken in connection with Sections 677 and 678, the authority conferred in this chapter does not apply to lands in which the city had an easement only, acquired by reason of its exercising the governmental power of the state, but applies solely to lands belonging to the city in its private capacity. And if I be wrong in this, then Section 676 would be unconstitutional in its application to lands in which the corporation acquired but an easement, if the city is given the right to sell the lands free from the easement by reason of the provisions of this section. And it further would seem clear that Section 676 at most must be confined to lands in which the municipality had a fee simple title.

Therefore, both by reason of the express provisions of the statute and by the authorities referred to, I hold that, by the appropriation proceedings of 1872, the city acquired only an easement in the land so appropriated.

The fact that only an easement for park purposes was taken leaves the fee still in the original owners, subject to the full and complete enjoyment of the use by the city for park purposes.

The next question that arises is, as to whether the use proposed to be made under the lease to the boat companies is within the terms of the easement taken by the city in the appropriation proceedings, assuming for the present that the pier and made land are part of the park.

The terms of the lease provide for the character of the occupancy and use to which the pier and part of the land devoted to switch tracks shall be subjected. This is stated in the lease

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to be for the construction of a passenger station, ticket offices, freight warehouses, railroad tracks, etc., with full right on the part of the boat companies to control the pier and to restrict access thereto, together with the right to widen the pier to 300 feet, and, further, prevent the construction of another pier within 300 feet of the leased pier so widened.

The terms of the ordinance recite that the proposed uses are consistent with park purposes; and it is urged that this declaration of council can not be disturbed by the court. In this the court thinks counsel are wrong. The statutes of Ohio, when the appropriation took place as well as now, discriminate between a park use and a wharf or landing use, and give cities power to appropriate for each, recognizing that such uses are different. A park use is primarily for pleasure and recreation, and does not essentially imply, on the part of the city, the right to make a profit out of such use; while a wharf and landing import a use for commercial purposes and transactions of commerce. Now, some uses of parks for purposes of landings and wharfs, incidental to features of pleasure and recreation, may be embraced in park purposes; but where the use is solely for commercial purposes, and requires an exclusive occupancy of the whole or part of the park, such use is not a park use. As well say that a railroad's station freight house and ticket offices and other buildings and tracks are a park purpose. The character of the occupancy provided for in this lease is wholly commercial, and, notwithstanding the declaration of council, is not a park use. Whether the occupancy provided for in the lease is a public purpose, I will discuss later.

The next question to be considered, again assuming that the made land and the pier are part of the park, is, whether the Legislature can authorize a change of the use of lands, in which an easement has been acquired for park purposes by appropriation, to a use for wharf and landing purposes.

From the terms of the lease, I am inclined to hold that the use provided for therein is consistent with wharf and landing purposes.

If a fee has been appropriated, it seems to be the law of this state that such change of use can be made from one purpose to another public purpose not inconsistent with the former use.

Malone v. Toledo, 28 Ohio St., 643:

"The state having, by its proper agencies, appropriated property in fee for the public uses of canals, it is within the power of the Legislature to authorize a change from one public use to another of like kind."

Ordinarily, where only an easement is taken, upon abandoning the use of the land for the purpose for which appropriated, it reverts to the owner of the fee, free from the easement. *Corwin v. Cowan*, 12 Ohio St., 629; *McCombs v. Stewart*, 40 Ohio St., 647; *Day v. Railway*, 44 Ohio St., 406.

If only an easement has been taken, and the proposed new use is consistent with the former use, a change in the use may be authorized, provided compensation is made for any additional burden. *Hatch v. Railway*, 18 Ohio St., 92; *Vought v. Railway*, 58 Ohio St., 124; *Newton v. Railway*, 115 Fed. Rep., 781.

These cases all decide that the proposed change of one use to another use must be consistent; and if consistent, the change, if authorized by the Legislature of the state, can be made.

In determining whether the proposed use is substantially similar to the original use, the courts have been pretty liberal in interpreting what uses are consistent and similar—changing a canal to a railroad right-of-way, changing a canal to a street, changing a country road to a toll road, and other like instances.

As said in *Malone v. Toledo*, *supra*, page 656:

"When real estate is so appropriated, for one particular public purpose, the fact that it is by legislative authority applied to another public purpose is not necessarily an abandonment, nor is it a forfeiture of the public interest. Instances are abundant in the legislation of the state where land has been taken for one purpose and used for another, without objection or complaint from any one."

Such change of use, however, must be for a public purpose, and not merely for a private use. In *Malone v. Toledo*, *supra*, at page 661, the court say:

"Since Hatch's case, the change of a canal to a public highway, such as the street of a city, can not be held to be such a change as to destroy the public interest. The use is still a public one and of the same nature. Does, then, the addition of water pipes and sewerage require us to say that it is a change to an

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entirely different purpose. In the present stage of municipal advancement, it must be considered that the public streets of a large city may legitimately be used for such purposes as these. Highways can not be confined solely to the uses to which they were adapted in the primitive state of mankind."

It is not necessary to the decision of these cases, in the view I have taken, to determine the character of the proposed use by the boat companies under the leases, whether public or private. The occupancy of this pier is practically exclusive; and the city, as long as the lease is in force, is prohibited from building a pier westward nearer than 300 feet, and to the eastward nearer than 200 feet. Yet the city has the right, on giving notice and paying the boat companies for the improvements they have made, in the manner required by the lease, to repossess itself of this pier and all things granted by the lease. The boat companies are public carriers by water, and are required to receive and transport passengers and freight for hire for whoever of the public requires their facilities. The character of the use to which the property leased is to be put partakes of the nature of a public rather than a private use, in the same sense that all the service furnished by railroad corporations is public. As was said by Mr. Justice Peckham in the case of *In re Mayor of New York*, 135 N. Y., 253, where the claim was made that the appropriation by the city of New York, therein in question, was to be for the sole use of special kinds of commerce and steamboats, and to lease the piers or property to certain steamboat companies, that such proposed use, under the circumstances of that case, was a public use, as distinguished from a private use, the court saying, on page 265:

"This mere permission to use property by leasing it to others, can not be regarded as providing for its private use. When used by leasees under the facts already stated, the use is a public one. The use is public while the property is thus leased, because it fills an undisputed necessity existing in regard to these common carriers by water, who are themselves engaged in fulfilling their obligations to the general public, obligations which could not otherwise be properly or effectually performed; and in filling the necessity for such accommodation, the city or the state is only performing its public duty."

The Legislature, by authorizing the making of such lease (101 O. L., 236), has said, so far as it is able, that this is a public use; and the courts should not lightly disregard such declarations. So far as necessary to the discussion of the law of these cases, I have, therefore, assumed that the use proposed under the lease is for a public purpose.

The next question is, whether the proposed change of use is so substantially similar as to be classed as consistent with a park use. As I have before said, the courts of Ohio seem to have been liberal in interpreting the change of use. We see in our streets every day many agencies illustrating what is included in or consistent with a street use. So, also, in examining what is a park use, we find a great diversity of structure and use. The fact that the possession of the pier is exclusive and the business commercial does not seem a greater diversion from park use than a steam railroad is from a canal.

I therefore hold that the proposed use by the boat companies is not so inconsistent with the park use that such change can not be authorized by the Legislature.

This brings us to the question as to whether such a change of use as is proposed creates any additional burden upon the land for which the reversionary owner is entitled to compensation. The reversionary owner still has the fee. The only thing taken from him is the park use; and by authority of the Legislature (101 O. L., 236), a new use is sought to be placed by the city upon this fee. While the use proposed is consistent with the park use, yet it is different, and involves a different occupancy and use from that of a park use. All use not taken from the owner by the appropriation is still in him; and to place his property under a new and different use is to take something away from him which he theretofore had. If so, the amount to which he is entitled as compensation for such different use is not for this court to determine. Clearly something is taken from him by the imposition upon the property of the new use. In *Hatch v. Railway*, *supra*, the court held that the change from canal use to railroad use entitled a reversionary owner to compensation for the additional burden. In that case the owner had acquiesced in the taking by the railroad, and brought his action for compensa-

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tion, treating the appropriation as an accomplished fact; and the court say, at page 122:

"The plaintiff, then, was entitled to compensation from the railroad company for the full value of such land as it may have taken from him not embraced in the appropriation made by the canal company; and for such additional burdens as may have been imposed upon the lands covered by the original appropriation; and for damage done or accruing to his adjacent lands, by reason of the additional appropriation, if any, and of the change of structure and of use from those of a canal to those of a railroad, in so far as such damages are peculiar to himself as a proprietor, and not common to the public at large. As the owner of land, subject to a perpetual easement, but appropriated and paid for only for the purposes of a canal, he had rights which the railroad company can not be permitted to ignore, and which, we think, it ought to have instituted proceedings regularly, under the statute, to condemn and pay for, before it ventured to divert the easement to uses so variant from those originally intended. But this not having been done, and the plaintiff having resorted to this action for compensation, the rights of the parties are governed by the same principles which would have been applicable in such a proceeding."

In *Vought v. Railway*, *supra*, where the action was to restrain the railroad from taking possession of property, which had been theretofore appropriated for canal purposes, until such railroad use had been appropriated, the court granted the injunction, enjoining the railroad from entering upon the lands until condemned and paid for.

Neither of these cases undertakes to fully state in what the additional burden consisted. So in the case before us the court does not think that it is for it to determine what the additional burden consists of.

There is language in *Malone v. Toledo*, 28 Ohio St., 655, 657, that indicates that a change from a canal to a street purpose would not be an additional burden, especially so to one who retains no rights as an adjoining owner. But while the language of the court there is applicable to both a fee and an easement, yet from the syllabus it appears that a fee was the estate under discussion and not a mere easement.

In view of the holding in *Vought v. Railway*, *supra*, it does

not seem that, where an easement only has been taken, there can be an imposition of a new use without an additional burden.

Where such an additional burden is placed upon the fee, the owner is entitled to an injunction until the right to the changed use is condemned, notwithstanding the fact that such owner might, by acquiescing in the appropriation as an accomplished fact, bring his action for damages at law.

There has been no laches shown on the part of the reversionary owner in this case, and I therefore hold that the Cleveland & Pittsburgh Railroad Company is entitled to an injunction restraining the change of use until the right to such changed use is appropriated.

Some claim is made that the petition of the Cleveland & Pittsburgh Railroad Company is framed upon a different theory, and therefore plaintiff is not entitled to an injunction. But, as stated in *Newton v. Railway, supra*, at page 786, where a similar claim was made:

"It is true the petition seeks a recovery upon the ground of abandonment, but, under the Ohio practice, if the facts stated constitute a cause of action, the demurrer should have been overruled, notwithstanding the petition may contain allegations which would not entitle the plaintiff to a recovery upon another theory. In this case the petition states facts sufficient to entitle the plaintiff to recover for such injury as he has sustained by reason of the additional burden imposed upon the fee by its appropriation to railroad uses."

We think the same may be said of the petition of the plaintiff in this case. The facts have been stated, and the prayer for relief is general; and upon the allegations, we think the proper relief should be an injunction, as was held in the above cited case.

It also follows that the suit of the tax-payer, claiming the proposed new use is a diversion, can not be sustained, holding as I do that, by legislative authority, the city had the right to change from one purpose to another consistent purpose. Such change will work no diversion of city interests, and therefore no right of the city will be impaired. The proposed use does not indicate any intention on the part of the city to abandon this land, but only an intention to use it for another consistent purpose; and therefore the tax-payer is not entitled to any relief.

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What I have said above has been based on the assumption that the pier and made land were and are a part of the park, and affected by like considerations as the land originally appropriated. Is such an assumption justified?

Counsel for the boat companies contend that the title to the land under the lake, on which the filling has been placed and the pier built, is in the state of Ohio, or in the city of Cleveland independent of its use of the land appropriated for park purposes. This contention is based on the holding of the Supreme Court in *Sloan v. Beimüller*, 34 Ohio St., 492. It is there held that the title of a riparian owner on Lake Erie extends to the line at which the water usually stands when free from disturbing causes; that the title to the land under the water is in the state of Ohio.

This title of the state, however, is not proprietary, but in trust for public purposes of navigation and fishery.

It will be noticed, however, that the court, in the fourth syllabus, does not attempt to decide as to the right of a riparian owner to build out beyond his strict boundary line for the purpose of wharfs and landing places in aid of commerce, not, however, interfering with or obstructing navigation.

The evidence in this case shows that as early as 1898 the United States Government had established the harbor line in front of this property; and that, both before and since, the city has been filling into the lake until it has made the land out to the piers, and constructed the piers so that they terminate at the harbor line. No interference or objection has been made by the state of Ohio to such construction, but, on the contrary, by its legislation in 101 O. L., 236, it has recognized that such filling has been done.

It seems perfectly certain that such filling has not been done by the city independent of its use of the uplands and riparian rights appropriated for park purposes, although the piling set by the city was paid for out of the funds appropriated for river and harbor purposes; yet such payments do not alter old nor create new rights in the city. Neither the city nor the state had any proprietary title in the submerged lands, and therefore neither could fill in front of these lands and claim a proprietary right, any more than it could, by filling in front of lands

of other riparian owners on the lake, acquire a proprietary right.

In this country the right of the riparian owner in navigable waters has been variously dealt with by the several states, as shown by the case of *Shively v. Bowlby*, 152 U. S., 1. And that decision determined that the right of riparian owners is one for local determination by each state. In the absence of such local determination, the question, when presented, has been referred to the common law.

Confusion has arisen by reason of the fact that some of the courts have failed to discriminate between decisions made in respect to waters in which the Crown held the underlying title as a proprietary right, and waters in which the Crown held title to the underlying soil in trust for public purposes only. In this country the states have succeeded to the right of the Crown under the common law. In those cases where the title to the underlying soil has been held to be in trust for the public purpose of navigation and fishery, the riparian owner has generally been held to have the right of access to navigable water, and the right to wharf out so long as he did not interfere with the public right of navigation and fishery. Where title to the underlying soil has been held to be proprietary, the right of access and to wharf out has been denied. I do not say this rule has always been followed, but it serves to distinguish most of the cases. In accord with the first class of cases, we find the decisions of *Dutton v. Strong*, 66 U. S., 23; *Yates v. Milwaukee*, 77 U. S., 493; *Illinois Cent. Ry. v. Illinois*, 146 U. S., 387; *Brookhaven v. Smith*, 188 N. Y., 74; *People v. Mould*, 37 App. Div., 35; *Hobart v. Hall*, 174 Fed. Rep., 433; *Fishmunger's Case*, L. R., 10 C. H., 679; *Duke of Buccleuch*, L. R., 3 Exch., 306. On the other hand, we find *Shively v. Bowlby*, *supra*; *In re Mayor*, 135 N. Y., 253; *Revell v. People*, 177 Ill., 468; *Cobb v. Comrs. Lincoln Park*, 202 Ill., 427; *Home for Aged Women v. Commonwealth*, 202 Mass., 422, and other cases.

The case of *Dutton v. Strong*, *supra*, is cited in the case of *Sloan v. Beimiller*, *supra*, page 515; and at least gives countenance to the claim that the rule it announced was not disproved by the Supreme Court.

If the title was in the state for public purposes of navigation and commerce, then it must almost inevitably follow that

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that trust must embrace all such facilities and instrumentalities as will aid and further that purpose.

If it be held that a riparian owner has no right of access to navigable water and the right to wharf out to it, then this trust in the state is idle and illusory. There is no one who can furnish the very things on which navigation and commerce depend, to-wit, wharfs reaching out to navigable water, and land on which must be constructed approaches by means of which wharfs can be reached. It is idle for the state itself to construct wharfs if it can not also have the land upon which to construct approaches. And it is just as idle for a riparian owner to have the land and not be able to construct a wharf out to navigable water.

The better doctrine seems to be, especially where no decisions are found to the contrary, that this right of the riparian owner includes the right of access to navigable water, and the consequential right to wharf out to navigable water, so as to make his right practicable and available, in aid of the very purpose for which the state holds such lands in trust. In fact such trust must be held to include this right on the part of the riparian owner to wharf out, so long as he does not interfere with the public right of navigation and commerce.

The establishment of the harbor line in 1898 or earlier fixed the point of navigability, and this determined the point beyond which the right to wharf out could not go. And since the state of Ohio has not interfered to prevent wharfing out to that point, no other person can prevent the riparian owner from availing himself of this right. In fact the right of the riparian owner seems exactly analogous to the right of the abutting owner in this state on a public street of the city. Such right of access, in this state, is a property right, of which the owner can not be deprived without compensation. I am aware that this analogy is denied in *Winifrede Co. v. Railway & Bridge Co.*, 24 Bull., 173, and perhaps rightly so, where the title of the state of Ohio in the bed of the Ohio river extended only to the low water mark; but in inland streams and rivers, when the ownership of the soil is to the center of the stream, the situation seems precisely like that on public highways and streets.

Even if the right of access of a riparian owner is not such property right as to require compensation if taken by the United States or the state, in furtherance of the paramount right of navigation as held in *Scranton v. Wheeler*, 179 U. S., 141, the state or the United States are the only agencies that can rightfully deprive the owner of such right, and then only in furtherance of the public right of navigation and commerce.

In this case no claim is made that the state has taken any action to limit the right to fill out to navigable water, or declare the made land to be an interference with navigation. It must follow that this made land was made by the city in connection with the riparian right which it appropriated; and whether the city obtained a title to the fee or only an easement to the soil underneath the filling when made, is not now important, for in either case it became affected by the same uses and purposes by which it held the upland, and consequently can not be disposed of, either by the city or state, independent of the purposes attached to the upland. *Chicago v. Ward*, 169 Ill., 392; *Ward v. Field*, 241 Ill., 496.

The reversionary right is attached to the riparian right just as fully and to the same extent as to the upland; and the use made of the land, in consequence of and in connection with the riparian right, can no more be changed by the city or state without a reappropriation than the upland.

The determination to which I have come, as above stated, is well set forth in *Farnham, Waters*, Sections 36-39c, 65, 66, 113, 113a, 113b, 113c, 114.

Counsel further have called attention to Chap. 35, Sections 442, 443 and 444 of the municipal code of 1866 (66 O. L., 222).

Section 442 provides that:

"The council of any city or incorporated village shall have power to establish, construct, repair, control and regulate landing places, wharves, docks, piers and basins; to establish, control and regulate the grades of wharves and landing places, and to fix the rates of landing, wharfage and dockage, and to use, for the purposes aforesaid, any public landing or any property belonging to or under the control of the corporation."

Section 443 provides that:

“All wharves or landing places hereafter constructed, shall conform to a uniform grade to be established by the council; and it shall be unlawful for the owner, lessee or occupant of such property to construct any wharf or landing place without first obtaining the consent of the council, and conforming to the established grade.”

Section 444 provides that:

“The council shall have the use and control, for the above purpose, of the shore or bank of any lake or river, not the property of individuals, to the extent and in any manner that the state can grant such use or control; and the power to appoint harbor masters, wharf masters, port wardens, and other officers usual or proper for regulation of the navigation, trade or commerce of the corporation, to define their duties and powers, and fix their compensation.”

By the first of the above sections the city is given the right to use for wharves, docks and piers any property belonging to or under control of the corporation.

By Section 444 the council shall have the use and control, for the above purposes, of the shore or bank of any lake or river not the property of individuals, to the extent and in any manner that the state can grant such use or control.

Taken together, the right granted to the city in the former section and to the council by the latter does not serve to increase or enlarge the estate which the corporation had in any lands. If the estate was limited to a particular use, the state could not increase the burden by imposing or authorizing a different use if the burden was increased. Section 444 expressly limits the grant by the state to the council to the extent and manner the state possessed. And Section 442 must be held to be applicable only to the lands in which the corporation or the state holds the fee. If literally applied, they would include dedicated lands and all lands held subject to special trusts.

There remain for decision the suits brought against the city of Cleveland by John G. White and Charles E. White, as taxpayers and as reversionary owners, to restrain the appropriation of the fee in the lands appropriated for park purposes in the proceedings of 1872.

The allegations of the two petitions are substantially the same, except as to the capacity in which the plaintiffs bring the actions. The basis of both actions is, that the present appropriation proceedings, by which the fee is sought to be acquired, are not brought in good faith. That while the purpose of the appropriation, as expressed in the ordinance of council and the application made to the court of insolvency to assess compensation, is to acquire the fee of these lands for park purposes, yet the real purpose of the appropriation is to acquire the fee so as to enable the city to sell a portion of the land to the railroad companies for a new union depot site, and to validate the leases to the boat companies; and that the real purpose is to divert park lands to those other purposes; and that said action of council is an abuse of corporate power.

The right on the part of the plaintiffs, as reversionary owners, to bring the action to question the good faith and purpose of these appropriation proceedings is conceded to have been decided by the Supreme Court in *P., C., C. & St. L. Ry. v. Greenville*, 69 Ohio St., 487; and for the reasons stated in that case, the suits by the tax-payers are properly brought, as otherwise there is no opportunity to bring to the attention of a court the question of the good faith of such proceedings when instituted by a municipal corporation.

The resolution to appropriate the fee was passed by council, September 6, 1910, and notice thereof served upon the reversionary owners.

On October 24, 1910, an ordinance was passed transferring \$2,000 from the contingency fund to the Lake View Park appropriation fund.

On November 14, 1910, the ordinance in question, to appropriate the rights of reversioners in these lands, was passed by council. The resolution above referred to, in Section 1 thereof, declares the necessity and intention of council "to appropriate to park use for park purposes the absolute estate in fee simple of the following described lands:" (then follows the description) "but subject to all legal highways, intending hereby to describe the lands usually known as Lake View Park; it being necessary, and the intent and purpose of the city of Cleveland,

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as authorized by law, to acquire all outstanding interests of every kind, character and description in the lands hereinbefore described, and to vest in itself an absolute fee simple title thereto."

The ordinance above referred to recites as follows:

"Whereas, the city of Cleveland, by appropriation proceedings and otherwise, is the owner of certain interests in the land hereinafter described; and

"Whereas, it is necessary for the city of Cleveland to acquire a fee simple title to all of said lands, so hereinafter described; "Therefore, be it ordained, by the council," etc.

"Section 1. That the absolute title in fee simple in the following described lands be, and the same is hereby, appropriated to public use for park purposes, to-wit:" (describing the lands) "intending thereby to describe the lands usually known as Lake View Park, and all estates, interests, rights and titles of every kind, character and description in the lands hereinbefore described not now owned by the city of Cleveland; be, and the same are hereby, appropriated to public use for the purposes aforesaid."

After the passage of said ordinance, and pursuant to its directions, the city solicitor made an application in the Insolvency Court of Cuyahoga County to assess compensation as provided by law. Said proceeding was set for hearing December 15, 1910.

From this ordinance it appears that the purpose for which the appropriation of the fee is made is declared to be "for park purposes." Plaintiffs in both suits allege, as stated, that this is not the real purpose, but that the real purpose is, to appropriate the fee in order to enable the city to sell part of these lands to the railroad companies, and to enable it to validate the leases to the boat companies, and for other purposes. The answer of the city in both cases denies any such purpose on the part of the city.

Evidence has been introduced to show that the Legislature authorized the appointment of a board of supervising architects May 6, 1902 (95 O. L., 879), to have supervision and control of the location of all the public municipal or county buildings to be erected upon ground already acquired within the limits of the city, and the size, height, style and general appearance of all such buildings, and requiring the approval by such board of all plans, specifications and locations. At the request of the city,

said board was appointed by the Governor in the year 1902. Thereafter this board prepared a comprehensive scheme for the grouping of the public buildings proposed to be erected, both by the city and the county.

On August 17, 1908, this board submitted two schemes in a report to the mayor of the city and to the council. In committee of the whole this report of the board was approved, or the action of council may have been only a vote of thanks to the board for its labors in preparation of the report. The evidence is not clear as to the exact action of council upon that occasion, as no record of such action has been kept.

By the report two general plans for the treatment of the grouping of proposed buildings and grounds were shown. One plan, "B," which was recommended by the board, included in the general scheme of location of the buildings a passenger depot at the north end of the mall located on lands embraced within the limit of the park lands. The other plan shows an open plaza at the north end of the mall overlooking the park and lake, and gives no location for a depot, and omitted such a building entirely from the scheme. Just how or why a depot came to be included in this report is not clear, whether upon the suggestion of the city officials, the chamber of commerce, or the architects. Such a building was not a public building over which the board had any control.

Subsequently, in June, 1910, by authority of the board, a second edition of its report, together with a supplemental report attached, was prepared, and the second plan or scheme above mentioned was omitted therefrom, and the one showing a depot at the north end of the mall being the only one retained.

I have stated this part of the evidence more fully than is perhaps necessary, but because this report and the first scheme above referred to is one of the principal foundations of the claim of the plaintiffs.

Shortly after the preparation of the first report, negotiations began between the mayor and council and representatives of the railroads, with a view to having a depot included in the group plan on the location shown by the report. Such negotiations were carried on intermittently by Mayor Johnson and representatives of the railroads, with full knowledge of the council, from

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that day forward during the entire incumbency of Mayor Johnson. Various other questions and demands by both the city and the railroads were interjected into the discussion, and these negotiations were practically broken off, and ceased for some time.

In 1906 the rights of certain reversionary owners were transferred to the Cleveland Trust Company as trustee, under some arrangement by which the money to purchase such rights was furnished by the railroad companies, upon an understanding that such rights would be transferred to the city of Cleveland upon repayment to the railroad companies of the considerations upon which the reversionary rights had been purchased.

In March, 1906, the statute, under which the present appropriation proceedings were brought, was passed by the Legislature at the instance and suggestion of the mayor and city solicitor. Many conferences were held between the mayor, the representatives of the railroad companies and committees of the council. During all this time, but prior to January, 1909, no progress had been made, and nothing looking toward an agreement between the city and the railroads had taken place. Beginning about that date, negotiations were resumed, meetings were held in the mayor's office, at which were present the mayor, some councilmen, representatives of the railroads, and other citizens, and plans for the construction of a union depot discussed.

On February 15, 1909, a resolution was passed by council, requesting the railroads to name a price they were willing to pay for the land.

On March 15, 1909, a resolution was passed by council, stating that, in the opinion of the council, the land was worth \$3,000,000.

Neither of these resolutions got any response from the railroad companies.

On April 26, 1909, a resolution was passed by the council directing the city clerk to communicate with the railroads and ask if they really wanted the land for the purpose of erecting a depot; and on May 17, 1909, a resolution was passed reciting that council was impressed with the necessity of the immediate construction of a union depot, and was anxious that the negotiations for the sale of the necessary land should be pressed forward, and asking for a reply from the railroads to the resolutions before passed.

On September 27, 1909, council passed a resolution requesting a conference with the railroad companies and the boat companies and the committee on harbors and wharves.

On September 30, 1909, pursuant to said resolution, a meeting was held in the mayor's office, at which were present the mayor, the city solicitor and other city representatives, the representatives of the railroads and of the boat companies. At this meeting it was stated by Mr. Moon, on behalf of the railroads, that plans had been prepared by Mr. Burnham, but had not been agreed to. Mr. Moon stated that he was not prepared to proceed with the preparation of plans until the price of the land was agreed upon, and requested that a committee be appointed for the purpose of determining something about the price. At this meeting Mayor Johnson waived any questions in dispute other than the depot question, and the railroads, on their part, receded from their position that the entire lake front question should be settled at the same time.

On October 4, 1910, the council appointed the mayor, W. J. Springborn, director of public service, and Robert Hoffman, chief engineer, a committee to act on behalf of the city, in conjunction with the representatives of the railroads, in the preparation of plans for the erection of a new union passenger station. No further meetings, however, were held between the mayor or this committee and representatives of the railroads.

On January 1, 1910, Mayor Johnson retired from office, and Mr. Baehr succeeded to the duties of mayor. At the same time an entirely new council came into office.

On January 13, 1910, Mayor Baehr named a commission of citizens, consisting of Charles F. Adams, chairman, and others, to take up the question with the railroads of a new union station; and on January 17, he met this committee and a joint discussion took place as to the situation in respect to park lands and their availability for a new union depot site. Mr. Baker, the city solicitor, explained the former negotiations had during the term of Mayor Johnson. The mayor asked that the commission find out what the land needed for the station site was worth.

On March 15, 1910, another conference was held between the mayor, the depot commission and representatives of the railroads, and a map or plan showing plans for tracks on the land

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to be used by the railroads was presented by engineer Hoffman. A general discussion was had by the representatives of the railroads, the city solicitor, and members of the commission, as to the value of the lands.

On March 30, 1910, another meeting was held, at which there were present, in addition to the mayor and the commission and representatives of the railroads, Mr. Burnham, of the group plan commission. Mr. Burnham presented a new plan for the station, omitting the office building which had been theretofore shown in the plan. The arrangement of tracks was shown in detail upon the plan. Discussion was had as to whether other railroads than the Lake Shore, Pennsylvania and the Big Four could be brought into the station. The cost of such a depot was discussed. Some question also arose as to the power to dispose of the land. Mr. Baker, city solicitor, told the commission he thought the city had power to acquire a fee simple title. It was further arranged that some action should be taken as to the price of the land wanted.

On March 31, 1910, the depot commission requested the Cleveland Real Estate Board to place a value upon the $35\frac{1}{4}$ acres needed for the proposed union depot site. This board fixed the total value at \$1,871,874.75.

On May 7, 1910, another meeting was held between the mayor, members of the depot commission and representatives of the railroads. Mr. Moon, for the railroads, was asked what the railroads would pay, and declined to set a price.

On May 9, 1910, another meeting was held, substantially the same persons being present. The question of the use of the park lands was discussed, together with the question of the location of the depot, and whether the railroads would consider a lease. Mr. Moon, for the railroads, stated he recognized the fact that the city owned the park property, and probably did not wish to sell to anybody other than the railroads; and that possibly the city would be willing to make a price that would put the lands within the reach of the railroads; and that the proposed building was much greater than the railroads' necessities, and that should be considered in making the price.

On May 23, a meeting was held, in which the mayor, the city solicitor, the commission, representatives of the railroads and

architect Burnham were present. Mr. Burnham explained the plan for a new station, but asked that plans might be more fully developed before submitting them. Mr. Burnham submitted a blueprint showing the lay-out of the tracks. The commission stated that they did not require a detailed plan, but such a one as would show the general character of the proposed building.

On July 11, 1910, the depot commission reported to the mayor that they had secured from the board of supervising architects the approval of the proposed union depot plan, and that steps had been taken to enter into an agreement between the city and the railroads; that questions had arisen as to whether the city could sell the land required for depot purposes, and requesting the opinion of the city solicitor. On July 16, in response to a request from the mayor, the city solicitor made reply, stating that he thought the lands could be acquired if terms could be agreed upon, not, however, expressing any opinion as to the method of acquisition.

On July 22, 1910, another meeting was held of the depot commission, the mayor, and representatives of the railroads. At this meeting the opinion of city solicitor Baker was read. At this meeting, also, Mr. Baker expressed the opinion that, apart from any negotiations that the commission might have with the railroads, all public lands required by the city for public purposes should be acquired in fee. He further expressed the opinion that if the city brought proceedings to acquire the fee, a court would not inquire into the purpose of council, that it was an opportune time for the city to acquire the fee simple title, and he said that if the city was going to sell the land, it should find out first whether it could.

On August 23, 1910, the mayor requested city solicitor Baker to prepare the necessary legislation to appropriate the outstanding interests in the park, to which Mr. Baker replied that he had come to the conclusion that appropriation proceedings should be begun to acquire all outstanding rights in the property.

On August 26, 1910, Mr. Baker again wrote the mayor, stating the necessary proceedings that would have to take place in order to appropriate such rights.

On September 6, 1910, the resolution of council declaring its intention to appropriate, heretofore referred to, was passed.

In the foregoing statement of the evidence, I have not undertaken to give the evidence in detail, but rather to indicate the number of conferences that have been held and the subject-matter of the conferences. The evidence has ranged over a number of years, and it would be utterly impossible to set it out in detail. I have therefore contented myself with the statement of the above outline.

There is no direct evidence showing that the present council was in any way informed of the negotiations under Mayor Johnson's administration, or influenced by them in passing this resolution and ordinance. There is no direct evidence showing that this council participated in or were conversant with the negotiations between Mayor Baehr and the depot commission, or were influenced thereby in passing this resolution and ordinance. No members of the present council or its committees, so far as appears from the evidence, were present at any such meeting held with the depot commission. There is no direct evidence indicating that the present council had in mind any effect of the present appropriation proceedings upon the leases to the boat companies, or were influenced to the passage of such proceedings by the fact that such leases had theretofore been made. Whatever finding is to be made in respect to the ulterior purpose, if any, of council in passing these appropriation proceedings, must be found from the acts and transactions of public officers of the city and private persons other than the members of the council itself. The fact that former councils may have had some negotiations looking toward the sale and transfer to the railroad companies of part of these park lands, can only be important as tending to show that the same intent persisted in the present council, and was operative to bring about the passage of these proceedings. During the trial, in admitting evidence of what took place between the various officers of the city, councilmen, board of supervision, and the representatives of the railroads prior to the incumbency of Mayor Baehr and the present council, I had considerable doubt as to the correctness of my ruling, as there was no direct evidence that any such acts or negotiations were brought to the attention of this present council, or that it had in any way been influenced by such negotiations in passing this ordinance; but the evidence of the acts of the former officials

of the city was finally admitted, on the theory that some continuity of purpose might be predicted on the action of the preceding council and city representatives as bearing upon or having some tendency to affect the acts of the present council, although the former council and mayor had passed out of office and the present council was an entirely different body. I still have some doubt as to this evidence, but, in the conclusion which I have reached, I have given all the evidence admitted consideration.

If this appropriation proceeding had been begun without any negotiations having taken place with the railroads, there could be no doubt that the city could prosecute it in order to acquire the fee underlying the park lands. General Code, 3692, expressly authorizes such proceedings. The necessity for such proceedings is wholly in the discretion of council, and no court would interfere with its exercise by council under such circumstances.

It is likewise certain that if council had acquired a fee in 1872, it could now lawfully deal with it on the basis of such ownership, and not be restricted simply to its use for park purposes.

Likewise it is true that council can not ostensibly appropriate for a public purpose, and then turn the property over to a private purpose. Such action would be clearly an abuse of corporate power, and unlawful. Whether council can acquire property for one public purpose, but in reality intend to devote it to another public purpose, may be open to doubt. But it is clear that, having acquired it for one public purpose, it may thereafter change the use to another public purpose, especially where circumstances and conditions have so changed as to render the property unfit or impracticable for the first purpose. Such changes of use are clearly authorized by the decisions of our state. If there had been no negotiations with the railroad and boat companies, there would be no question of the wisdom of council in acquiring the fee to this property, in order that the city, having the fee, might deal with it in respect to the conditions and situation of the property as they might hereafter arise. The fact that an easement had been sufficient for all purposes of the city for forty years might be, under changed conditions, a very cogent reason for exercising its right to appropriate a fee in order to deal with the property in the future on the basis of having the fee. Does the fact, then, that these negotiations have taken place,

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show that it is any less desirable or any less the part of wisdom for council now to wish to acquire the fee? Undoubtedly not. So the wisdom of such acquisition of the fee must be granted, irrespective of the negotiations. Of course it might not be necessary to acquire it at this precise moment, but it is probable that the city might want the fee at some future moment, so as to change the use, and what more opportune time than now?

But it is contended that, because of the negotiations, it must be held that the present declared purpose is not the real purpose, but that the real purpose is disclosed by the negotiations. Undoubtedly the negotiations brought forcibly to the attention of the city officials the condition of this title, and the city's inability to deal with this land for other than park purposes; and this seems to have been the most probable reason for the action of council in passing this ordinance, in order that, as conditions arose, it might deal with this property as might seem most beneficial to the public. The right of council to carry on these appropriation proceedings had there been no negotiations, being unquestioned, we then have a case where the declared purpose of council is clearly and palpably wise and lawful; and a claim made that such declared purpose is not the real purpose, but a mere subterfuge to enable the city to turn over to the railroads about 35 acres out of a total of 90 acres or more of the park land.

Every intendment of the lawfulness of the action of council must be presumed by the courts; and this presumption must stand until overcome by clear and convincing evidence. The court can not hold that the purpose declared by council is not the real purpose, unless it be satisfied from all the evidence that the declared purpose is not the true purpose. No other rule than this can be applied in a case where the action of a legislative body is attacked.

From the evidence before the court, it appears that, while negotiations have been carried on by representatives of the city and the railroad companies towards a transfer of about thirty-five acres to the railroads for a depot site, yet at no time has there been any agreement of the city or the railroads as to either the building of a depot or as to the consideration or terms upon which a transfer of the proposed site might be made. Negotiations have been pending for seven years under Mayor Johnson,

and since under the present mayor, and yet have produced no definite results. The entire plan seems as yet to be in a tentative shape. It may be entirely given up or abandoned. No one is committed to any such definite proposition that the court can predicate of these negotiations to date any fixed and definite purpose on the part of the city to transfer the site, or of the railroad companies to build a depot on the proposed site, or that any terms of sale will ever be agreed to between the parties. Such negotiations might have influenced the purpose of council, but it would seem to be giving to the evidence the utmost effect to say that it is probable that if the city acquires these rights, it will convey the site to the railroad companies, and that this was the probable purpose of the council in passing the resolution. But, as I have said before, there is no direct evidence at all in respect to any such ulterior purpose on the part of the present council. The only evidence looking to such purpose in the council is, that negotiations were carried on between the former mayor and council and the railroads, and between the present mayor and the railroads; and that the present mayor, in carrying on such negotiations begun by his predecessor, ascertained that the title was such that the city was unable to deal with this land for any other purpose than park purposes; and the present council, feeling certain that the time would surely come when it would be only the course of prudence and wisdom for the city to have the fee of this property, instituted these proceedings to acquire the fee.

That such a course is in accordance with the present policy of the state is evidenced by the recent legislation enacting that in every appropriation of land for public purposes a fee shall be taken, unless a lesser interest is specified in the appropriation ordinance; and also the legislation under which this proceeding has been undertaken authorizing the acquisition of a fee where only an easement has heretofore been acquired.

Such a course being so manifestly prudent, the court finds that the evidence as to the ulterior purpose does not rise to that degree of clearness and conviction that would warrant the court in enjoining this proceeding.

I therefore refuse the injunction, and dismiss the cases brought to enjoin the appropriation proceeding.

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Brewing Co. v. International Union.

UNLAWFUL CONDUCT OF A LAWFUL STRIKE.

Superior Court of Cincinnati.

**THE BELLEVUE BREWING COMPANY V. INTERNATIONAL UNION OF
THE UNITED BREWERY WORKMEN OF AMERICA ET AL.**

Decided, April 20, 1911.

*Strikes—Circumstances Warranting Workmen in Collectively Leaving
Their Employment—Peaceable Persuasion Justified, whether Di-
rected Against Other Workmen Likely to Enter the Employer's
Service or Against Customers of the Employer—But Threats and
Intimidation are Subject to Injunction.*

1. A labor union strike, where the purpose is to settle a trade dispute, or some other question growing out of and incidental to the relations of the strikers themselves with their employer, and the conduct of the strikers is free from force, intimidation or false representations, and is intended to better the condition of the strikers rather than to punish their employer, is a lawful undertaking, notwithstanding the strikers may know that their collective action will result in damage and injury to their employer.
2. Where an employer, contrary to the working agreement into which he has entered with his employes, displaces some of them, and further violates said agreement by giving the union no opportunity to fill the places of those discharged with competent fellow-servants, and steadfastly refuses to meet the business agent of the union, and otherwise exhibits an intention to ignore and disregard the said agreement with the union, a sufficient justification for a strike is afforded, and a strike under such circumstances can not be said to have been provoked through sympathy for the discharged workmen.
3. Strikers have the right, in the conduct of a lawful strike, to use peaceable means to induce customers or prospective customers of their employer to withdraw their patronage from him and give it to others.
4. But the distribution of circulars among customers of the employer, which are so couched as to be understood as a threat against those who continue to patronize him, and the accompanying of such distribution by conduct and language on the part of the strikers of such a character as to leave no doubt of their intention to injure those who continue to patronize him, constitutes an illegal conduct of the strike against which injunction will lie.

Littleford, James, Ballard, Frost & Foster. for plaintiff.
Charles W. Baker, contra.

HOFFHEIMER, J.

This cause was heard on motion of plaintiff for a temporary restraining order, and by the prayer the court is asked to restrain defendants from doing the alleged illegal acts complained of in the body of the petition.

These alleged illegal acts referred to, may be stated to be:

(a) That defendants are engaged in a sympathetic strike in the nature of a boycott and should be enjoined.

(b) That the purpose of the strike is not only unlawful, but is being carried out by unlawful means, that is, by acts of intimidation and threats against plaintiff's employes who did not strike, and in order to compel them to quit plaintiff's service.

(c) Threats to injure Mr. Klotter.

(d) That defendants are boycotting plaintiff by the circulation of the circulars, Exhibits 1 and 2.

Charges (a), (b) and (c) may be considered together.

In support of plaintiff's contention that the strike herein inaugurated is unlawful, both because of its purpose and the means resorted to effectuate it, I am cited to a number of cases by plaintiff, some of which will be found digested in 6 L. R. A. and 17 L. R. A.

Reynolds v. Davis, 198 Mass., 294, is the latest of the class of cases cited by plaintiff. This case (by a divided court, Knowlton, Ch. J., dissenting) it may be noted has been criticised as inconsistent and extreme. *Martin on Labor Unions*, Section 49; Note 17 L. R. A., 163.

The majority opinion, however, is based on cases such as *Carew v. Rutherford*, 166 Mass., 1; *Plant v. Woods*, 167 Mass., 492; *Pickett v. Walsh*, 192 Mass., 172, all of which cases are also cited by plaintiff.

Attention to these cases shows that the combination to strike or the strikes were illegal because effected or indulged in for other or more remote purposes than the settlement of any complaint on the part of the strikers themselves, as to wages or methods or surroundings in their particular employments, or did not have to do with any trade dispute or other matter that was the natural outgrowth or incident of the relation of employer and employed.

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In *Moore v. Bricklayers' Union*, 23 W. L. B., 48, 53 (cited by plaintiff). Taft, J., in the course of the opinion, said, speaking of *Carew v. Rutherford*:

"We do not conceive that in this state or country a combination by workingmen to raise their wages or to obtain any mutual advantage is contrary to law, provided they do not use such indirect means as obscure their original intent and make their combination one merely malicious to oppress and injure individuals. Such we understand to be the effect of Chief Justice Shaw's opinion in *Commonwealth v. Hunt*, 4 Metc., 125, where it was held that a society of workingmen, one of whose rules bound the members not to serve any master who employed non-society workmen, was not illegal of itself until it appeared that the purpose was unlawful. Accordingly in *Carew v. Rutherford*, where a contracting stone-mason, contrary to the rules of his workman's union, sent some of his material out of the state to be dressed, and his men refused to work for him any longer unless he paid a fine to the society, and upon his refusal left him and only returned upon the payment of the fine, it was held that this combination being for the purpose of extortion and mischief, was illegal."

Plant v. Woods, *supra*, arose out of a fight between two labor unions, and it will be found that defendant union endeavored to coerce members of plaintiff's union into joining their organization by coercing employers into discharging such as refused, leading such employers to believe that if they did not do so they would suffer through strikes and boycotts.

Of *Re Higgins*, 27 Fed., 443, it is said, in the note to *Pickett v. Walsh*, *supra* (6 L. R. A., 1070), that the court declared itself satisfied, from the fact that the great majority of the strikers were not aware of any reason for the orders to strike, that the reason given therefor was a mere pretense, and that the real motive was to compel the recognition of a certain labor organization, so that its officers should be consulted in the operation and management of railroads in which they had no interest and of which they were not employes, an object which in the court's opinion plainly made their acts illegal.

In *Thomas v. Cincinnati, etc., Ry. Co.*, 62 Fed., 803 (cited by plaintiff), the court said:

"The combination was unlawful. * * * The employees of the railway companies had no grievances against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of Pullman cars as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours or in any way determine their services. Simply to injure him in his business they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service and actually quitting their service. This inflicted an injury * * * unlawful because it was without lawful excuse. All the employees had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect on the character or award of their services. * * * The purpose shortly stated was to starve the railway companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do."

In *Quinn v. Leathem*, A. C., 495, the members of a labor union were made to respond to damages for the injury done to the plaintiff, a butcher, by compelling one of his customers to cease dealing with him through threats of calling out the union men in the customer's employ, where it appeared that such members were not the employees of the plaintiff, and their sole grievance against the plaintiff was that he had refused to discharge his employees, all of whom were non-union men and to employ in their places members of the defendant union.

In *Giblan v. National Amalgamated Union*, 2 K. B., 600, cited by plaintiff, it was held, that the officers of a trade union were not justified in combining to prevent a workman from obtaining any employment in his trade, by threatening his employer with a strike of the union men in the latter's employ, where none of the acts of such officers were done on behalf of the fellow laborers of such workmen, or in the exercise of any right of theirs to withdraw themselves from an employment in which he took part, but were performed with the sole object of compelling him to pay the arrears of his defalcations as a former officer of the union.

In *Pickett v. Walsh*, *supra*, the principle is declared that the right which a labor union may exercise is limited to strikes against persons with whom the organization has a trade dispute (Syllabus 4), and that strikes are illegal where they are indulged in, not for the purpose of settling some trade dispute between the strikers and their employers, but for the purpose of coercing their employers to coerce another employer to settle a trade dispute between him and other combinations, whether of his own employes or of others.

Erdman v. Mitchell, 207 Pa., 79, is also in this same class, and in that case there was no complaint as to wages, etc., by any of the men working on the building when the strike was declared. In other words, it was not a case of grievance between employer and employed but was a case of indirect coercion to accomplish another and more remote purpose.

It would thus seem, negatively at least, that where the alleged collective wrong, results from the collective act, done however with right and justifiable cause, such act could not be said to have been done maliciously (*Walker v. Cronin*, 107 Mass., 505), and so as to render the combination unlawful, and a strike, therefore, would be lawful where the purpose was to settle a trade dispute or some other question arising out of and incidental to the relations of the strikers themselves and their employer; that is, done with justifiable cause.

In *Karges v. Local Union 131* (165 Ind., 421), there was an attempt to obtain an advance in wages, a shorter work-day, and to require the employer to furnish a scale of prices. This was held to be a lawful object. The doctrine was enunciated that employes under no contractual constraint may lawfully combine by prearrangement to quit their employment in a body for the purpose of securing from their employer an advance in wages, shorter hours or any other legitimate benefit, even though they know at the time that such action will be attended with injury and damage to the business of their employer, provided the strike is carried on in a lawful manner—that is, in a manner free from force and intimidation and false representation. (See note to *Reynolds v. Davis*, 17 L. R. A., 167.)

In *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla., 969, the court said:

"Before the courts can punish or prevent a conspiracy, either the act conspired or the manner of its doing must be unlawful. Are not both alternativess absent in the case of a simple strike? It is certainly lawful to attempt by negotiation or other peaceable, legitimate ways to get higher pay for one's labor, and if the attempt is not made to go elsewhere with one's labor or to sit idle if needs be until satisfactory arrangements are made. Labor unions in and of themselves can not be said to be unlawful, and yet one of the prime objects of their existence is by combinations of the supply to regulate the demand. Some of the cases, particularly the English cases, stress the motive underlying the strike, and apparently hold that if the strike is to better the condition of the workman it is lawful, but if it be to punish the employer it is unlawful. If this be the correct delimitation, the case comes up to the rule."

See, also, *State v. Stockford*, 77 Conn., 227; *Johnson Harvester Co. v. Meinhardt*, 60 How. Pr., 169; *Everett Waddy Co. v. Union*, 105 Va., 188; 4 Mete., 111; 28 App. Div., 396; *Allen v. Flood* (1898), A. C., 1; 170 N. Y., 315; 99 App. Div., 605.

Now the evidence material to this branch of the case shows that plaintiff corporation had a preliminary working agreement with Beer Drivers' and Stablemen's Local Union 175 (with which the displaced auto truck drivers were affiliated). Section 1 of said preliminary working agreement (*it was not, however, a serv. ce contract*) was as follows:

"Section 1. None but drivers of Driver's and Stablemen's Local Union No. 175 shall be employed in the stabling departments of the parties of the second part; provided, nevertheless, that whenever party of the first part shall not be able to supply competent men, the employer shall have the right to engage other men, and these shall, when properly certified by their respective employer, be eligible as members of Drivers' and Stablemen's Local Union No. 175, provided their election does not conflict with the constitution and by-laws of the Union of the United Brewery Workmen."

Plaintiff corporation it seems had similar working agreements with the other defendant unions, all of which are substantially

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similar (the differences apparently arising because of the difference of crafts), and Section 1 in all the agreements is identical. These agreements, as I understand, were entered into contemporaneously or practically so, and were between a combination of or rather practically all of the brewery proprietors of Cincinnati, Newport and Covington on the one hand (including plaintiff corporation) and a combination of brewery workmen of the International Union of the United Brewery Workmen of America, as represented by their various local branches or unions on the other hand. These agreements on inspection it will be found represented mutual concessions and had to do with the relations of employer and employed, and breweries operating under them were entitled to be known as union breweries.

Whether these agreements were originally devised or promoted by defendant International Union of United Brewery Workmen of America, I am unable to say from my recollection of the evidence; but its endorsement I believe appears on the agreements. Each agreement was signed by the brewery proprietors; that is to say, by practically all the operating brewers of Cincinnati, Covington and Newport, and by the representatives of the several local unions as well. It is significant also, that all these working agreements, were by *express limitation to expire simultaneously*.

The evidence further shows that Mr. Klotter, president of plaintiff corporation, either arbitrarily or without sufficient reason, or possibly with justification, it is not material which, displaced the two union drivers, members of Local Union 175, and he gave to this union or its officers no opportunity, as Section 1 contemplates and requires, to furnish or supply "competent men," even if those displaced were not competent, a point upon which I now need express no opinion. By his persistent refusal to meet with the business agent of the union, who made every endeavor to see him, his purpose to disregard and to ignore the agreement under which all the men had been and were at work became manifest, and fully justified the officers and members of Union 175 (and indeed the officers and men of the other unions as well) in believing that he did not intend longer to abide by the agreement. This belief was further justified by his final

refusal to meet with Mr. Stalf at the Brewers' Exchange, notwithstanding he had expressly promised (through one of his counsel) so to do; and also by statements which had come to the ears of these men generally (through Mr. Engel, plaintiff's former business associate) that "he (Klotter) intended to bust up the unions," a threat, however, which it is but just to say, Mr. Klotter denies having uttered.

When the business agent of Local Union 175 found that Mr. Klotter would not meet him; a meeting of all the employes of plaintiff was called at the hall close by the brewery, as early as six o'clock in the morning, evidently at this place, in the hope that the matter could be satisfactorily adjusted and so as to enable the men to go to work. When finally it appeared that there was no purpose or desire on the part of Mr. Klotter to adjust the matter or to carry out the agreement which they claim was violated, all the employes of plaintiff affiliated with defendant unions of the International Union of the United Brewery Workmen of America at a joint meeting of their respective unions under their joint executive board, acting in concert, unanimously and voluntarily voted to walk out or to strike because plaintiff had failed to live up to his agreement; and thereupon, or some time thereafter, I am not positive as to the precise time from my recollection of the evidence, a conference committee consisting of Messrs. Colnot, Kummer and Stalf, was appointed to take charge of the walk-out or strike.

Now under such a state of facts the employes of plaintiff affiliated with Local Union 175 certainly had legal right and ample justification for acting as they did; and I do not know of any law which would forbid them from seeking or following the advice or acting upon the direction of their union or its officers, if that is what occurred (see *D., L. & W. R. R. Co. v. Union*, 158 Fed., 541); and if the court is justified, asserting the inherent prerogative of equity, in looking through form to substance and in inferring from the circumstances surrounding the execution of these several preliminary working agreements, their language and their object and purpose, that it was the general understanding of all the parties who signed these agreements that they were but parts of a symmetrical whole working agree-

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ment and plan, intended to govern the relations of all these local brewery proprietors and their union men in each particular brewery signatory thereto, then surely, all of plaintiff's employes (not only those of Local 175, but those affiliated with all the other unions) had a grievance of their own with reference to their relations with their employer. For the prime importance to workmen of working agreements of this character, especially where, as here, they contemplate giving the working man first say in the selection of competent fellow-servants, attention in passing may be directed to language of Alton B. Parker, Ch. J. (170 N. Y., 315, 324).

Under the circumstances as just detailed such strike could not be said to be, as plaintiff claims, a sympathetic strike. For definition of sympathetic strike see *1 Eddy on Combinations*, Section 520.

If, then, their strike was not without justifiable cause, even though they may have known that their action would be attended with injury and damage to plaintiff's business, their strike would still be lawful, provided it was carried on in a lawful manner, without force, violence, intimidation or false representation.

The next question would be, has there been resort to methods necessitating the interposition of equity?

After the men voted to walk out or strike, so far as plaintiff's brewery premises, his property or his workmen who did not go out on the strike are concerned, the men have conducted themselves according to the evidence in an orderly and peaceable manner. Some evidence was offered in an attempt to show that one Adams had some words with one Flaxmeyer, but the cause of the alleged quarrel and the circumstances are not entirely clear, and I would be unwilling to say under the evidence who it was provoked it. The private secretary testified that one evening she was jostled by a man who ran down the street, and there was also some one who testified as to having heard a threat uttered against Mr. Klotter. There was also some conflicting evidence by two laborers as to an alleged threat made against them by another laborer; but the evidence upon this also is very uncertain and conflicting. So that I may say that there is substantially nothing in the evidence, especially in view of the good

behavior of the men generally, at and around the premises, that would warrant this court in concluding that "threats or acts of intimidation have been made against employes who did not join the strike to compel them to quit plaintiff's service" (petition) of such character as to warrant the interference of equity. If, however, it hereafter appears at any time, and by evidence reasonably tending to show that the men are departing or are about to depart from peaceful means or legal acts, then the court will not be slow to act.

We come now to charge (d), that defendants are engaged in intimidating plaintiff's customers or in boycotting, by the distribution of the "*Unfair to Organized Labor*" circulars (see Exhibits 1 and 2, petition).

Now the strike having been held to be lawful, it would follow that defendants had every right by peaceable persuasion to induce others (customers or prospective customers) to withhold patronage from plaintiff to aid them in their justifiable strike (*Martin, Law of Labor Unions*, Section 72); this, by parity of reasoning, that men have the lawful right to peacefully persuade others not to work for the one against whom they have a grievance. But this does not mean that unlawful means may be used or that a boycott may be established.

With reference to circulars such as are here involved, there are two jurisdictions where in furtherance of a lawful strike the strikers may combine to withhold or threaten to withhold beneficial business relations from their employers' customers to compel them to withhold their patronage from him, and circulars of the kind herein complained of, would be lawful and not subject to restraint by injunction, even though it were construed as importing a threat by the combination publishing them that its members would withhold beneficial business relations with the person so published as unfair.

Defendant relies on cases from these jurisdictions; and cites the court to *Parkinson v. Building Trades Council*, 154 Cal., 581; *Lindsay v. Mont. Fed. of Labor*, 37 Mont., 264.

But such decisions as the court intimated during argument are against the weight of authority, and it is held that if the publication is to be construed as amounting to a threat of the character

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mentioned, it should be enjoined. *Hey v. Wilson*, 232 Ills., 389; *Gray v. Building Trades Council*, 91 Minn., 171.

What is believed to be the correct rule (*Martin, Labor Unions*, Secs. 83, 106a) is stated by the Supreme Court of Minnesota (91 Minn., 171) as follows:

“Whether a publication of the character under consideration would in any case amount to a threat or intimidation, must be determined from all the facts and circumstances of each particular case. Such notice might have special significance in a particular case and have no meaning in another, and in the absence of any showing that it was intended as a threat or intimidation an injunction should not be granted.”

Or, as Martin puts it, a circular stating one is “unfair” “does not necessarily import such threat and is not unlawful, and in consequence should not be enjoined, unless it is shown to be a threat to withhold beneficial business relations from those who patronize the person with whom the combination making the publication has a trade dispute.” *Martin on Labor Unions*, Sec. 106a.

Applying such tests, under the evidence, there is scarcely room for doubt as to the purpose for which these circulars were designed, or to doubt, from the character of the publications in and of themselves, and the methods resorted to in distributing them and used in connection therewith, that they were threats of the kind prohibited by law and were understood as threats by plaintiff’s customers generally, and had such effect.

As soon as the circulars were placed in the customers’ hands, even in such instances where nothing more was said, there is evidence tending to show that the customer knew “what was meant.” He knew that unless he stopped dealing with plaintiff he would lose his “bread and butter”; and whereas it is evident he would not otherwise have done so (in a number of instances), further business relations with plaintiff were stopped by customers through fear of losing their own business. Moreover, in numerous instances (I do not undertake to quote *in totidem verbis*, but give substance only, according to recollection), the circulars were accompanied by direct threats and statements explanatory of the circulars and of their purpose.

For example, Otto Horst (saloonkeeper) tells of a visit of several of the employes, including I believe Mr. Kummer. He was told he would have to change his beer. He was told that a picket would be put at his saloon from morning to night. He complained of this unfair treatment, but he was told he had to change, and accordingly he did change his beer. (Mr. Kummer was one of the committee of three heretofore referred to.)

Circulars were placed in the saloon of Jacob Peller and he was told to sell some other beer, and that if he did not "they would boycott his place." They distributed the circulars in his neighborhood, to the injury of his business. Defendant Larberg, he said, threatened at the time, that if he did not put in other beer, they would make the boycott stronger, and that every union man that came in would be fined twenty-five dollars.

One Hess (saloonkeeper) knew what the circulars meant and knew it would harm him if he did not put in other beer. "I didn't want to lose my bread and butter," said he.

George Kennig (saloonkeeper) received circulars and was asked what he was going to do about beer. He says he was told that "a gang was to be put in front of his place." Edward Rowell (saloonkeeper) was given circulars and told that there was to be twenty-five dollars fine for any union man caught drinking Bellevue beer. Thornton Wall said he was told his place would be boycotted. One James Long (saloonkeeper) was handed circulars and told that they were gotten out to boycott plaintiff's beer; that he must quit selling plaintiff's beer; that if he did not, the circulars would be distributed in his neighborhood. He is corroborated by one Ladinger, a gardener, who says that one of the men told Long that if Long did not quit selling Bellevue beer they would boycott him.

Plaintiff testifies his receipts have fallen off about fifteen hundred or two thousand dollars a week. But enough of the evidence is set out for the purposes of this motion, and from the nature of which it must be apparent that the circulars themselves and the methods used in their distribution and in connection therewith, have and are having the natural effect of exciting the reasonable fear and apprehension of injury on the part of plaintiff's customers, causing them to cease business re-

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lations with plaintiff, to the injury of plaintiff in his business, and hence property rights; and accordingly, I can not but conclude, under the evidence, that these circulars were designed to operate, and were and are so used as to operate, and do operate as a threat of the character forbidden by the authorities cited, and by which I am bound.

As injunction is held the proper relief against threats of the character herein indulged, a restraining order *pendente lite* will issue enjoining the defendants, and all of them, from further publishing and distributing, or in any way using the circulars in question, and accordingly as prayed for.

DISMISSAL FOR DEFAULT VACATED.

Common Pleas Court of Franklin County.

FIRST NATIONAL BANK V. ALBERT E. FISHER.

Decided, 1911.

Dismissal—Failure to Reply Not Ground For—Vacation of Judgment on Merits for Failure to Answer Interrogatories—Sections 11350 and 11631.

1. A defendant is not entitled to a judgment of dismissal on the ground that the plaintiff is in default for reply to answer.
2. A judgment will be set aside and vacated at a subsequent term of court where the matter came up on a motion by the defendant to dismiss for failure to answer interrogatories attached to the answer of the defendant, and the entry shows a hearing on the merits with judgment of dismissal.

L. D. Lilly, for plaintiff.

Harry Kohn, contra.

KINKEAD, J.

The defendant submits a motion to set aside and vacate an order of dismissal made in this case on June 20, 1910, at the last term of the court.

The grounds of the motion are that the motion asking for the relief and upon which the order was made sought only to have

the action dismissed, first, for failure on the part of the plaintiff to answer certain interrogatories attached to the answer, and second, for failure to reply to the answer of the defendant.

The motion was sustained, the judge entering the order stating:

"I see no reason why the motion should not be sustained. Same is accordingly sustained, and judgment of dismissal entered. Exceptions."

The following entry was prepared by prevailing counsel, which was not shown to counsel for the defendant, but which was entered upon approval of the court:

"And now this cause came on to be heard upon the motion of the defendant to dismiss the action of plaintiff for failure to answer interrogatories attached to the answer and for failure on the part of the plaintiff to reply to the second defense of the answer, and the same was argued by counsel and submitted to the court and the court doth sustain both of said motions.

"And this cause came on further to be heard upon the petition, answer and evidence, and it appearing to the court that the plaintiff is in default for want of reply to the second defense of the answer, the same is confessed by the plaintiff to be true, and the court doth accordingly find the issues in this case in favor of the defendant. The action herein is dismissed at the costs of the plaintiff."

The action of plaintiff was by a bank of Vandalia, Ill., upon a note for \$500 in the ordinary short form of pleading.

The answer of defendant avers that the note was given in consideration for a Berkshire boar; that G. G. Council agreed to sell defendant a certain Berkshire boar which was actually selected and which Council agreed to deliver, but that Council fraudulently substituted another entirely worthless and different boar which he shipped.

Defendant avers that upon discovering the alleged fraud he notified both Council and the plaintiff; that the plaintiff knew the facts, and is not a *bona fide* holder.

Twenty interrogatories were attached to the answers, all of which appropriately bore upon the *bona fides* of plaintiff.

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Plaintiff was in default for pleading or answer to the interrogatories from April 9, 1910, until the entry of the order of dismissal.

The power of this court to vacate its own judgment after the term at which it was made is prescribed by General Code, 11631 (R. S., 5354).

The ground upon which claim may now be made for a vacation is probably under paragraph 3, for "irregularity in obtaining a judgment or order."

There seems to be no doubt but that there was an irregularity in taking the judgment, particularly that part which recites that the "cause came on further to be heard upon the petition, answer and evidence," "and the court doth accordingly find the issues in this case in favor of the defendant."

The court made no such finding, and the judgment part of this entry does not correctly recite the action of the court.

The power of the court sought to be invoked by the motion filed by defendant is to be found in the provisions of General Code, 11350 (R. S., 5101):

"Answers to interrogatories may be enforced by an order of dismissal, judgment by default or by attachment, as the justice of the case requires."

Counsel for defendant in filing his motion for a dismissal of the action probably proceeded upon the theory that the only way that the court could enforce answers to interrogatories attached to defendant's answers would be by a judgment of dismissal of plaintiff's action.

A proper construction and interpretation of the power conferred upon the court by this provision involves a consideration of power of a court generally to render a judgment by default, as well as the primary purpose of the section itself.

The statutes, General Code, 11381-11389 (R. S., 5132-5136), cover fully the time or order in which cases shall be tried. General Code, 11383, makes special provision for a class of cases in which judgment can be entered upon default without taking testimony, viz.: actions upon accounts or written instruments.

The only other provision for judgment by default is made by General Code, 11592 and 11593 (R. S., 5320). That is, by General Code, 11592, judgment may be taken, as upon default, for so much of the demand as is not in issue.

In cases where a plaintiff is in default for reply to an answer, there can be no judgment of dismissal invoked by the defendant by reason thereof.

It may be that the only way judgment by default can be had against a plaintiff who has not answered interrogatories attached to an answer, is by dismissing his case. But the primary purpose of General Code, 11350 (R. S., 5101) is to enforce an answer to interrogatories by means of a penalty. And the better mode of practice would seem to be to make a conditional order of dismissal, although this may not be incumbent upon the court.

But the entry of judgment transcends the boundaries of a judgment of dismissal by way of enforcing the penalty for not answering the interrogatories, and is a judgment on the merits.

And I am not sure that the better practice is not to enforce this penalty until the case is regularly reached for trial. There is no reason why this kind of default should not be treated as ordinary defaults for pleading, now taken care of by order of this court to require the assignment commissioner to report them for dismissal for want of prosecution.

I am of the opinion, too, that the rule of this court requiring entries to be submitted to opposite counsel should have been complied with. It is to be distinguished from *Interstate Life Assur. Co. v. Raper*, 78 Ohio St., 113, where no appearance of any counsel had been entered, and no answer or other pleading had been filed, and judgment had been regularly entered by default.

Here the entry of judgment of dismissal as well as upon the merits was invoked by a defendant who had filed an answer, and the plaintiff himself was in default for reply.

The motion to vacate the judgment is sustained and the same is hereby vacated.

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**LEGISLATURE WITHOUT AUTHORITY TO VACATE AN
ORDER OF DISBARMENT.**

Common Pleas Court of Lucas County.

IN RE CHARLES A. THATCHER.

Decided, February, 1912.

Constitutional Law—Conferring of Authority to Practice Law a Judicial Act—Charles A. Thatcher's Reinstatement by the General Assembly Without Effect—Judicial and Ministerial Acts.

1. Where one claims the right to practice law by virtue of a special act of the Legislature appointing him to be an attorney at law, and objection is made to his participation as an attorney at law in the trial of a case then pending, no question of his fitness to occupy the office of an attorney at law is raised, but the court is required to determine his right to practice, and in so doing will determine the constitutionality of the act under which it is claimed such authority was conferred.
2. While the General Assembly may enact laws prescribing the qualifications necessary for admission to the bar, and may also provide for disbarment in cases where the commission of certain offenses has been satisfactorily established, authority to admit an applicant to the privileges of an attorney at law involves the exercise of judicial power, and an attempt by the General Assembly to exercise such authority is an attempt to exercise judicial power, and is void and without effect.

BROUGH, J.; MANTON, J., concurs; CHITTENDEN, J., concurs in a separate opinion; JOHNSON, J., dissents.

On the 25th day of June, 1909, by a decree of the Supreme Court of this state, the respondent, Charles A. Thatcher, was denied the right and privilege of longer practicing law in the state of Ohio. Some time thereafter the respondent made application to the Supreme Court for a modification of this decree, which application was denied. On April 18th, 1911, the General Assembly of the state of Ohio passed an act, which later became a law, which, by its terms, authorized and empowered Charles A. Thatcher to appear as an attorney and counselor at law in all the courts of record of the state of Ohio, and all the rights and privileges of an attorney and counselor at law were

granted to and conferred upon him by said act. The said act further provided, "On his taking an oath of office before any person authorized to administer an oath, the said courts are directed to receive him as such attorney and counselor at law."

On the 16th day of January, 1912, Charles A. Thatcher, the respondent, appeared before a branch of this court, as one of the attorneys for the plaintiff in the case of McGough against the receiver of the Wheeling & Lake Erie Railroad Company. The attorney for the receiver objected to the respondent appearing as an attorney in the trial of the cause. The respondent insisted upon his right to appear, notwithstanding the objection. Thereupon the court, with all four judges sitting, ordered that the case on trial be continued and the matter of the objection be set specially for hearing. Upon the date set the matter was ordered to be separately docketed and heard independently of the case in which the objection was raised. The matter was thereupon heard by the court and taken under advisement.

Respondent denies the right of the court to determine, in this proceeding, the question of his right to practice under the special act of the Legislature. The respondent having presented himself at the trial table in a cause regularly assigned and called for trial, and having claimed the right to appear before this court as a member of its bar, and that right having been questioned, it becomes the duty of the court to determine his standing as an attorney. And the fact that the constitutionality of an act of the Legislature is necessarily involved in a determination of this question can not, in the opinion of the court, alter the situation. Respondent insists that by virtue of the legislative enactment referred to, he has a right to appear before the court as an attorney, and the court must determine the question.

The question thus presented to the court in nowise involves an inquiry into the fitness of the respondent to occupy the office or position of an attorney. The sole question which we are called upon to consider, and which we have considered and will pass upon, is the effect to be given to the act of the Legislature authorizing and permitting respondent to appear before this court as an attorney and counselor at law under the circum-

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stances. This necessarily involves a determination of the constitutionality of the act in question.

Is this act in conflict with the Constitution?

The Constitution of the state is its fundamental law. It is the body of rules and principles enacted by the people themselves, and under which they consent to live and be governed. Until abrogated by the people, it is the paramount law. The people themselves adopt the Constitution by referendum vote, and no department of the state government can do any act in contravention of its provisions.

Judge Cooley, in his great work on "Constitutional Limitations," says:

"A constitution is sometimes defined as the fundamental law of a state, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised. Perhaps an equally complete and accurate definition would be, that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."

And further, page 5:

"In American constitutional law, the word 'Constitution' is used in a restricted sense, as implying the written instruments agreed upon by the people of the Union or of any one of the states as the absolute rule of action and decision of all departments and officers of the government in respect to the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even of the people themselves, will be altogether void."

Where an act of the Legislature is in conflict with, or is at variance with the Constitution, which is the fundamental law, the Constitution must be preferred. In other words, the intention of the people as expressed in the Constitution must be preferred to the legislative act, which is merely an expression of the intention of their agents; and wherever the will of the Legislature, declared in its enactments, stands in opposition to that of the people as declared in the Constitution, the court, in de-

termining between the two, must be governed by the Constitution rather than by the act of the Legislature.

Again quoting the language of Judge Cooley:

"The will of the people as declared in the Constitution is the final law, and the will of the Legislature is law only when it is in harmony with, or at least is not opposed to, that controlling instrument (the Constitution), which governs the legislative body equally with the private citizen." Constitutional Limitations, page 6.

Article I, Section 2, of the present Constitution of Ohio provides:

"All political power is inherent in the people; government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the General Assembly."

Article II, Section 1, provides:

"The legislative power of this state shall be vested in the General Assembly. It shall consist of a Senate and House of Representatives."

Article III, Section 1, provides:

"The executive department shall consist of a Governor, Lieutenant-Governor, Secretary of State, Auditor of State, Treasurer of State, and an Attorney-General, who shall be elected," etc.

Article IV, Section 1, provides:

"The judicial power of the state is vested in a Supreme Court, circuit courts, courts of common pleas, courts of probate, justices of the peace, and such other courts, inferior to the Supreme Court, as the General Assembly may from time to time establish."

Article II, Section 32, provides:

"The General Assembly shall grant no divorce, nor exercise any judicial power not herein expressly conferred."

No judicial power is conferred by the Constitution upon the General Assembly which is material in determining the questions here involved.

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These provisions of the Constitution divide the powers to be exercised into three separate and distinct classes or departments—the legislative, executive and judicial. The right of each class or department to do any specific act is determined by the question whether that act is in its nature legislative, executive or judicial. Every power exercised by the government must fall within one of these classes, and it can not be exercised by a department of the government to which it does not belong. By virtue of this arrangement, as stated by Judge Cooley, each department is made to constitute a restraint upon the actions of the others, to keep them within proper bounds, and to prevent hasty and improvident action.

In this country the legislative authority is subjected to the control arising from the Constitution. From the Constitution, the legislative department, as well as every other department of the government, derives its power. When the legislative department attempts to exercise a power conferred by the Constitution upon one of the other departments, and, the matter of its right to do so comes regularly before a court, it is the duty of the court, in its exercise of the judicial power conferred by the Constitution, to determine the question as to where the power rightfully belongs, and if wrongfully exercised by the legislative department, to declare the act in controvention of the Constitution, that is, to declare it unconstitutional.

Is the power to authorize an individual to appear as an attorney and counselor at law in the courts of this state a judicial power? If it is, then the legislative enactment now under consideration, and by virtue of which respondent claims the right to practice, is a usurpation of judicial power by the legislative department of the state, and is unconstitutional. This question has been before the courts of last resort of many of the states, and we are not without authority in determining it. The question has arisen, both in relation to the admission and disbarment of attorneys, and from the reasoning, the two powers are so closely allied as to constitute but the exercise of the same general power.

“Their (attorneys) admission, or their exclusion, is not the exercise of a mere ministerial power. It is the exercise of a

judicial power, and has been so held in numerous cases. It was so held by the Court of Appeals of New York in the Matter of the Application of Cooper for Admission," said the court in *Ex Parte Garland*, 4 Wall. (U. S.), 333.

The case of Cooper, above referred to by the Supreme Court, is one strongly relied upon by respondent to sustain the position that the act in question is constitutional. In that case the court says:

"Attorneys and counselors are not only officers of the court, but officers whose duty relates almost exclusively to proceedings of a judicial nature, and hence their appointment may with propriety be entrusted to the courts, and the latter, in performing this duty, may very justly be considered as engaged in the exercise of their appropriate judicial functions." *In re Cooper*, 22 New York, 81.

In *In re Day*, 181 Ill., 90, the court say:

"The function of determining whether one who seeks to become an officer of the courts, and to conduct cases therein, is sufficiently acquainted with the rules established by the Legislature and the courts governing the rights of parties, and under which justice is administered, pertains to the courts themselves. * * * The order of admission is the judgment of the court that he possesses the requisite qualifications. If the Legislature by inadvertence, as in this case, assumes the exercise of a power *belonging to the judicial department*, it should only be necessary to call its attention to the restraint imposed by the Constitution."

While the provision of the Illinois Constitution relating to the distribution of power is not identical with the provisions of our state Constitution, the result arrived at is the same, and there is no reason why the language above quoted should not be applied to the case at bar.

The Supreme Court of Pennsylvania, in 1888, deciding the case of Joseph P. Splane, said:

"It was decided in Brackenridge's case, 1 S. & R., 187, as long ago as 1814, that the admission of an attorney by the court of common pleas is a judicial, not a ministerial act, and for this reason this court refused a mandamus in that case. The same reason would justify us in refusing it in this."

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And the court said further:

"If there is anything in the Constitution that is clearly beyond controversy, it is that the Legislature does not possess judicial powers. They are lodged exclusively in the judiciary as a co-ordinate department of the government."

In the case of *Hanson v. Grattan*, 84 Kans., 843, the court say:

"The power to admit applicants to the practice of the law is judicial and not legislative."

The court in *In re Goodell*, 39 Wis., 232, say:

"The Constitution makes no express provision for the bar. But it establishes courts amongst which it distributes all the jurisdiction of all the courts of Westminster Hall in equity and at common law. And it vests in the courts all the judicial power of the state. The constitutional establishment of such courts appears to carry with it the power to establish a bar to practice in them. An admission to the bar appears to be a judicial power. It may therefore become a very grave question for adjudication here, whether the Constitution does not entrust the rule of admissions to the bar, as well as the expulsion from it, exclusively to the discretion of the courts."

The question above propounded by the Supreme Court of Wisconsin was answered by the same court in 1876, in the case of *Ole Mosness*, a resident of Illinois, who made application to be admitted to the bar of Wisconsin. In that case the court say:

"Members of the bar are officers of the court, and in some sense officers of the state for which the court acts. If Chapter 50 (Laws of 1855) was intended to do more than authorize the appearance here of members of the bar of other states as counsel in the trial and argument of causes, it was without the power of the Legislature." *In re Mosness*, 39 Wis., 509.

The New York Court of Appeals in the case of *Cooper*, before referred to, use the following language:

"If the removal or suspension of an attorney be, as was held in these cases (*Strother v. Missouri*, 1 Mo. Reports, 605; *In re Secombe*, 15 Howard [U. S.], 15), a judicial act, it is difficult to see how the admission of an attorney is any the less so, espe-

cially when, as here, the court in the act of admission is required to pass not only upon the sufficiency of the evidence of certain facts, but upon the constitutionality and the validity of a statute, and thus to exercise the highest judicial function ever entrusted to a court."

And also the following language:

"The only rational interpretation of which the act admits is that it was intended to make the college diploma competent evidence as to the legal attainments of the applicant, and nothing else.

"The Legislature has not taken from the court its jurisdiction over the question of admission, but has simply prescribed what shall be competent evidence in certain cases upon the question.

"They (attorneys) are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal learning and fair private character. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such and conduct the cases therein."

The court in the Cooper case was passing upon a statute admitting to practice on a diploma of Columbia College. While the court in the case found that the power to admit is subject to legislative control the finding was based on the peculiar history of admission to the bar in New York, and after a finding by the court that the power is a judicial power and that the statute was merely a rule of evidence. The ultimate finding is opposed to the great weight of authority.

The Supreme Court of Ohio, in respondent's case, in determining this question, say:

"It is almost universally held that both the admission and the disbarment of attorneys are judicial acts, and that one is admitted to the bar and exercises his functions as an attorney, not as a matter of right but as a privilege, conditioned on his own good behavior, and the exercise of a just and sound judicial discretion by the court." And cites in support thereof: *In re Durant*, 80 Connecticut, 140; *Bradwell v. Illinois*, 16 Wall. (U. S.), 130; *In re Day*, 181 Ill., 73; *In re Charles A. Thatcher*, 80 O. S., 654.

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Basing our opinion upon the above authorities and a number of other cases which have been examined, we are constrained to hold that the admission of attorneys is a judicial, and not a legislative act, and that the power to authorize an individual to appear as an attorney and counselor at law in the courts of this state, is a power that can not be exercised by the legislative department of the state, and that the act, by virtue of which the respondent claims the right to practice, is unconstitutional.

In arriving at this conclusion we have not failed to take into consideration the general act of the Legislature, pursuant to which citizens of the state are admitted to practice, and, after admission, they are, under certain circumstances, disbarred.

In the exercise of the police power, the Legislature probably possesses the power to prescribe qualifications for admission and grounds for disbarment. And it may prescribe the method of procedure therein. The Legislature has prescribed qualifications for admission, and has designated the tribunal which shall exercise the power to admit to practice, and the courts of the state, without questioning the right of the Legislature to so enact have for years operated under those provisions and it is not for this court, at this time, to question this method or procedure, or the force and effect of any judicial order made in accordance therewith. The constitutional right of the courts, however, to admit or disbar, is not surrendered by reason of the recognition by the courts of this procedure.

The order is that respondent be not permitted to practice before this court.

CHITTENDEN, J.

The question presented is one of grave importance, rising, as the respondent has well said, far above the personal right or privilege directly involved. We have, therefore, given it most thoughtful consideration in an endeavor to place our conclusions upon fundamental principles as well as upon the consideration of the cases cited in the argument. It should be distinctly understood that we are trying no question of the fitness or unfit-

ness of Mr. Thatcher to practice law. We are required to determine one question only: Is the act of Legislature passed April 18th, 1911, authorizing and empowering Charles A. Thatcher to appear and act as attorney and counselor at law in all the courts of the state a valid law, or is it in conflict with the Constitution of the state? If it is valid he is entitled to practice law at this bar. If it is not valid he is not entitled to so practice.

The entire structure of our government rests upon the foundation of popular sovereignty. The people constitute the sovereign power and, by direct vote, they have established the Constitution of the state as the written expression of their will. It is the fundamental law to which all must conform, and which can only be changed by the people themselves. By the state Constitution the people have established the state government after the federal plan, that is, by dividing the government into three distinct branches—the executive, legislative and judicial. Each of these branches is independent of the other and neither may encroach upon the functions and duties of the other. Upon the maintenance of this most excellent system of checks and balances must depend not only the efficiency, but the permanence of our free government. This has been clearly stated by Chief Justice Gibson of Pennsylvania as early as 1850. He said:

“The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches of it—the legislative, the executive, and the judiciary—which, within their respective departments are equal and co-ordinate. Each derives its authority, mediately, or immediately from the people; and each is responsible, mediately or immediately to the people for the exercise of it. When either shall have usurped the powers of one or both of its fellows, then will have been effected a revolution, not in the form of government, but in its action. Then will there be a concentration of the powers of the government in a single branch of it, which, whatever may be the form of the Constitution, will be a despotism—a government of unlimited, irresponsible and arbitrary rule. It is idle to say the authority of each branch is defined and limited in the Constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that

it is thoughtlessly but habitually violated; and the sacrifice of individual right is too remotely connected with the objects and contests of the masses to attract their attention." (15 Pa. State, 18.)

That the judiciary has not been free at all times from such encroachment may be freely conceded. The duty, however, devolves peculiarly upon the judiciary, as the interpreter of the law, to see that these constitutional limitations are preserved. Speaking upon this duty the Supreme Court of Georgia used the following language:

"The right here asserted, is a necessary attribute of every court in the country, as will appear from the fact, that if there happens to be an irreconcilable variance between the Constitution—which is the fundamental law—and a particular act proceeding from the legislative body, that which has the superior obligation and validity, ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statute—the intention of the people to the intention of their agents. Nor does this conclusion, as is shown in the work first above cited, by any means suppose a superiority of the judicial to the legislative. It only supposes that the power of the people is superior to both, and that where the will of the Legislature, declared in statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than those which are not fundamental." (8 Ga., 218.)

Judge Ranney, of the Supreme Court of Ohio, says:

"It is the right and duty of the judicial tribunals to determine, whether a legislative act drawn in question in a suit pending before them, is opposed to the Constitution of the United States, or of this state, and if so found, to treat it as a nullity."

The rule for construction is stated by him as follows:

"In such cases the presumption is always in favor of the validity of the law; and it is only when manifest assumption of authority and a clear incompatibility between the Constitution and the law appear, that the judicial power will refuse to execute it." (1 Ohio St., 77.)

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The rule as laid down by Judge Cooley is as follows:

"Except where the Constitution has imposed limitations upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not, in a particular case. The courts are not the guardians of the rights of the people of the state, except as these rights are secured by some constitutional provision which comes within judicial cognizance." (Cooley, Constitutional Limitations, 236.)

With the duty resting upon the court as above shown, and observing the rules of construction as above stated, let us inquire as to what, if any constitutional limitations effect the act in question.

Article II, Section 1, provides:

"The legislative power of this state shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

Article IV, Section 1, provides:

"The judicial power of the state is vested in a Supreme Court, circuit courts, courts of common pleas, courts of probate, justices of the peace, and such other courts, inferior to the Supreme Court as the General Assembly may from time to time establish."

Article II, Section 32, provides:

"The General Assembly shall grant no divorce nor exercise any judicial power not herein expressly conferred."

By this latter section, it will be seen that the people have undertaken to especially guard this judicial power and permit its exercise only in and by its courts. And this is a salutary provision because legislative action is frequently upon ex parte hearing.

There is no definition in the Constitution of the term legislative, executive and judicial, but the distinction, in the main outline, is quite well defined.

That the Legislature may, in the exercise of the police power, enact laws prescribing certain necessary qualifications for admission, and for rules of procedure for both admissions to the

bar, and disbarment is undoubted, and the law has been so announced by many courts.

It is urged that, if this be true, then the Legislature may, in the exercise of that same power, appoint any individual to the office of attorney at law. But does that conclusion follow?

There can be no dispute but that the Legislature has power to enact laws providing for court procedure; but because it may determine grounds for the granting of a new trial, it does not follow that it can by legislation direct a new trial in any given case. This has been determined in some sixteen states where the question has arisen.

The Legislature has exclusive power in Ohio, to define crimes and provide punishment, but this does not make the administration of the criminal law less judicial.

We hold that the Legislature has full power to prescribe qualifications without which no one shall be admitted to practice law in the courts of this state.

We further held that the Legislature may require the courts to disbar any attorney who is found, upon judicial inquiry, to no longer possess these moral qualifications essential to the proper administration of justice, but that the *determination of the right to admission* under those qualifications and the necessity for disbarment in each case, is a judicial act, resting with the courts alone. I will not undertake to review the cases examined, as my associates have done that.

We have examined every case cited, and many others. We find no case holding to the contrary. Every decision upon this question, from the foundation of our government, so far as we have been able to learn, has held that the admission of attorneys to practice at the bar of the courts is a judicial act.

The rule is concisely and accurately stated in Volume 3, American & English Encyclopedia of Law, page 287, as follows:

“It lies within the power of the Legislature to prescribe the qualifications requisite to admission to the bar and the courts will have no authority to admit any person not possessing the necessary qualifications; but the admission of an applicant to practice is a judicial act, and the attorney when admitted is

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an officer and member of the court. The Legislature has no power, therefore, to provide that any person possessing certain qualifications must be admitted. It can not assume judicial powers, and in every case the courts are vested with discretion as to whether an applicant is entitled to admission."

It has been held to be a judicial act by the Circuit Court of Hamilton County in the case of *Wilson v. Whitacre*, 4 C. C., 15.

We have endeavored to examine every case that has arisen in this country, in which this question was involved, and, without a single exception they have held the act of admission to be the exercise of a judicial power. The very cases cited by the respondent so held.

There is no question as to the right of the Legislature of this state to pass special laws of the character prescribed by the Constitution, but they are not permitted, either by special or general act, to exercise judicial functions. In the several special acts cited by the respondent, as an exercise of the claimed power to create attorneys at law, it is found, upon examination, that the Legislature has, in each case, recognized the right of the courts to pass upon their admission, and have not undertaken by the act, to create any individual an attorney at law, except by the act now under examination.

In the act cited by the respondent for the relief of James A. Crawford, it was provided that he may be admitted to an examination for admission to the bar in accordance with the general law upon the subject, but without producing to the judges a certificate that he has regularly and attentively studied law during the period of two years previous to his application for admission.

In the act in 43 Ohio Laws, 20, the courts were permitted to examine Robert W. Russell for admission to practice in this state, notwithstanding the fact that he was, at the time, an alien. In 50 O. L., 12, a like act was passed for the relief of Otto Drussell, and by an act in 51 O. L., 534, permission was given the district court to receive the application of Otho H. Velzler and Alpheus Hurd, they being, at the time, aliens, and permitting the courts to admit them to practice, and providing further that

if said persons did not become naturalized within a certain length of time, that their licenses should be revoked.

Thus it will be seen that, in every instance in which the Legislature has enacted laws with reference to the admission of attorneys at law, they have recognized the judicial power involved, and have never undertaken to exercise that power except in the case of the respondent.

So far as we have been able to ascertain this is the first instance since the foundation of the federal government where a Legislature has undertaken to exercise this power. The respondent urged upon us a consideration of the brief of Theodore Dwight, filed in the case reported in 22 N. Y., *In re Cooper*. We have made a careful examination of this brief. The first contention made by Mr. Dwight, and which he argues earnestly, is that the act of admission is a judicial act. We fail to find anything in the brief of Mr. Dwight which argues for the right or power of the Legislature to create an attorney at law by legislative enactment.

Whatever may be the fact in actual practice, the administration of justice requires the highest ideals, and the strictest integrity upon the part of both the bench and the bar. If the courts are stripped of power to regulate and control the conduct of the attorneys practicing at its bar, with reference to their practice, then indeed will this profession, which affords so many opportunities for improper conduct, be left open to ruthless and unprincipled persons without any restraint whatever.

The Legislature has made it the imperative duty of the courts, when complaint is made of improper conduct upon the part of a practicing attorney, to make judicial inquiry into the same, and to punish any such attorney at law found guilty of such offense. When, in obedience to such law, the court has made inquiry into the charges, and found the attorney guilty, and has imposed the punishment, it is not within the power of the Legislature, under the guise of a relief act, to set aside such finding by reinstating the attorney to practice.

The Supreme Court of this state long ago held, in the case of *John A. King*, 54 O. S., 415, that upon the disbarment of an attor-

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ney at law, the court rendering such decree retained a continuing jurisdiction over him for the purpose of entertaining any application for reinstatement. In other words, the order of disbarment operates as a continuing injunction restraining the person from practicing as an attorney at law until such order is vacated. Any act of the Legislature, therefore, which undertakes to reinstate the attorney operates expressly as an order vacating a previous order of the Supreme Court. Thus, in effect, does the Legislature of the state establish itself as the ultimate court of appeal.

The exercise of this power might not be so important in an individual case, but if it be contrary to the Constitution, it should not then be permitted as a precedent upon which further encroachments might be built. We quote from the *Federalist*, No. 78:

“The judiciary is, beyond comparison, the weakest of the three departments of power—that it can never attack, with success, either of the other two, and all possible care is requisite to enable it to defend itself against their attacks.”

We are therefore convinced, from a careful study of the adjudicated cases, and upon consideration of the fundamental principles underlying our system of government, that this act is clearly in conflict with the Constitution of the state, and is therefore void and of no effect.

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**CONTRACTS FOR INTERCHANGE OF TELEPHONE
BUSINESS.**

Common Pleas Court of Medina County.

**THE MEDINA COUNTY FARMERS' TELEPHONE COMPANY v.
THE MEDINA TELEPHONE COMPANY.**

Decided, October 30, 1911.

*Telephones—Public Policy of the State that Indiscriminate Service
Shall be Furnished—Jurisdiction of Courts to Enforce Specific Per-
formance of Contract—Policy of the Courts where Public Rights
Are Involved—Contracts Which Are Illegal in Part—Connections
with Neighboring Telephone Exchanges.*

1. Where two telephone companies combine to jointly serve the subscribers of both companies, equity will not enforce a contract which provides for any discrimination of service among those similarly situated.
2. An agreement between two such companies that neither will operate in the territory of the other, or connect with each other's competitors, is against the public policy of the state, and a court of equity will not enforce such a contract unless the illegal part can be eliminated; and if it appear that the contract would not have been entered into had the exceptionable provisions been omitted, it is evident that the consideration is to that extent unlawful and the contract can not be enforced in any part.

Frank Heath and Lee Elliott, for plaintiffs.

Kline, Tolles & Morley and J. W. Seymour, contra.

WASHBURN, J.

In Medina county there are about ten telephone exchanges, owned and conducted by five or six different corporations. The plaintiff is one of such corporations, and the defendant is another.

The territory covered by the operation of the defendant's exchange includes Medina, the county seat, and extends into the country immediately adjoining the city, for some distance. The territory covered by the operation of the plaintiff's exchange

is in the country and adjoins the defendant's territory on the southeast. There is another exchange south of the Medina exchange, which joins the territory of the defendant company on the south and also joins the territory of the plaintiff company on the western side. There is an exchange joining the plaintiff's territory on the east and south. None of these exchanges are more than five or six miles apart, and some of them operate telephone lines within the territory of the plaintiff company, to some extent. There are also other exchanges in different parts of the county.

Along the line where the territories of the plaintiff and defendant join, known as the Paradise road, both companies have telephone lines and subscribers. Some of these various exchanges throughout the county have connection with each other, and all of them connect with the defendant's exchange at the county seat. But the plaintiff has no connection with other exchanges in the county, except through the defendant's exchange. The defendant company has connection with a long distance line, but plaintiff has no such connection, except through and by virtue of defendant's exchange.

This being the situation, in May, 1910, the plaintiff and defendant entered into the contract, a violation of which it is sought to enjoin in this action. By that contract it was agreed, among other things, that the defendant should furnish to the subscribers of the plaintiff company free service in talking with the subscribers of the defendant company, but the defendant company reserved the right to charge its subscribers a toll for talking with the plaintiff's subscribers, if it saw fit to do so; and it was agreed that the plaintiff should furnish to the subscribers of the defendant, free service in talking with the subscribers of the plaintiff. but the plaintiff reserved the right to charge its subscribers a toll for talking with the defendant's subscribers, if it saw fit to do so.

A certain part of Medina county was set apart and designated on a map as the territory of the plaintiff, and another part of Medina county was designated as the territory of the defendant. and each company agreed not to build or extend any telephone lines outside of the territory thus assigned to each company. By said contract, the parties "mutually agree that neither will make

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any connection or interchange in telephone service with any person, firm or corporation operating any telephone lines within" the territory set apart to the other, "without the written consent of both parties to this agreement." As to the territory that was within both the territory set apart to the plaintiff and the the territory set apart to the defendant, that is, along the Paradise road, where the two territories join, it was agreed that the "conditions shall remain as they are now are, and neither party to this agreement will supplant a telephone of the other party, without its written consent."

The defendant company violated this contract by discontinuing free service to plaintiff's subscribers, and this action is prosecuted to enjoin a continuation of such violation of the contract.

The first claim of the defendant is that its officers, who assumed to act for it in entering into the contract, had no authority to make the contract on behalf of the defendant company. On that claim, the court finds against the defendant, holding that, considering the action of the directors of the defendant company, as shown by its records and the oral testimony, and considering the acts and conducts of the defendant, through its officers and agents, in carrying out the terms of the contract, said contract was the contract of the defendant, duly and legally entered into, and so far as its execution is concerned, is binding on the defendant company.

The jurisdiction of the court to enforce this contract is also questioned by the defendant, the claim being that the effect of the relief asked is to grant specific performance of this contract, and it is urged that a court of equity will not grant such relief as to a contract, the performance of which requires continuous acts, involving skill, judgment and technical knowledge.

The court recognizes such to be the general rule, but in a case where the interests of the public were involved, in a litigation between private corporations, Chief Justice Fuller of the Supreme Court of the United States, has this to say:

"It must not be forgotten that in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has

contrived its remedies so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated; and has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed." 163 U. S., 564.

Where the rights of the public are involved in the contract, and the best interests of the public will be subserved by enforcement of the contract, courts of equity will grant such relief, especially where that can be done by a decree which is complete in itself, such as is asked in this case. That this is not in conflict with the Ohio Supreme Court decision reported in the 48 Ohio State, page 324, see 13 C.C.(N.S.), at page 351. See also 4 C.C.(N.S.), 191.

It is also claimed by the defendant that this contract is against public policy, and therefore void. First, it is urged that such a contract is prohibited by what is known as the Valentine anti-trust law. If this was a criminal prosecution under that act, it might be that the contention of plaintiff that the telephone business is not included within the comprehensive terms, "trade or commerce," used in said act, would have to be sustained, in view of the decision of the Supreme Court in the 28th Ohio St., at page 521; but the strict construction required in criminal cases does not necessarily apply to the question of public policy, and if there was no other legislation in the state upon the subject of telephones, it might well be said that this act was intended by the Legislature to express a public policy against restriction of competition in the telephone business. There are, however, other acts of the Legislature, expressive of a public policy relating to the subject of telephone companies, which, considering their history, with the aid of familiar rules of construction, are controlling, so far as they are in any apparent or real conflict with such anti-trust law.

By Section 9171 of the code, a telephone company is authorized to "join with any other such company in conducting, owning, using or maintaining such line or lines, upon such terms as may be agreed upon" by the companies.

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Plaintiff claims that the contract in this case is authorized by this section, and an argument is made which construes the statute to sanction the exclusive provisions of the contract in question, but this view of the statute entirely overlooks the provisions of Section 9182 of the General Code which was enacted at the same time that Section 9171 was enacted, and as a part of the same act.

By Section 9182, expressly made applicable to telephone companies, the right of telegraph companies to join with each other in conducting, leasing, owning and using or managing telegraph lines, is restricted to such contracts as will furnish indiscriminate service to the public. That section reads:

“Every company, incorporated or unincorporated, operating a telegraph line in this state, shall receive dispatches from and for other telegraph lines, and from or for any individual; and on payment of its usual charges for transmitting dispatches as established by the rules and regulations of the company, transmit them with impartiality and good faith.”

These acts of the Legislature, as I have said, are by another section of the code made applicable to telephone companies, and they are enactments of the Legislature which have long been upon the statute books of the state, and they have been construed by the Supreme Court of the state.

In a case reported in the 36th Ohio St., 296, the facts were that the Columbus Telephone Company, owning and operating an exchange in Columbus, was using telephones under a lease from the Bell Telephone Company, by which the Columbus Telephone Company agreed not to furnish service to a proposed subscriber who was engaged in the telegraph business, except the Western Union Telegraph Company, with which the Bell Telephone Company had contracted to give the exclusive right to use said telephone system and exchange for the purpose of collecting and distributing telegraphic messages.

The B. & O. Railroad Company, which was engaged in the telegraph business and desired to become a subscriber of the Columbus Telephone Company, was willing to comply with the rules and regulations of the Columbus Telephone Company, and the latter company having refused to extend its service to the

B. & O. Company, suit was brought to compel it to do so. The order of the court compelled the Columbus Telephone Company to extend such service to the B. & O. Company, holding that its contract with the Bell Telephone Company was against public policy and void, because, under said statute, it was the duty of the Columbus Telephone Company to furnish service to any one within the sphere of its operations who desired to become a subscriber and was willing to comply with its rules and regulations. In other words, the Supreme Court determined that said statutes established the public policy of the state to be that telephone companies should furnish indiscriminate service, at least within the sphere of their active operations, to all who were similarly situated. That was the settled public policy of this state, as established by the Legislature and the decisions of the Supreme Court, when the contract in question was entered into.

Under that public policy, it was therefore the duty of the plaintiff to accept as a subscriber anyone along the Paradise road, which was within the sphere of its operation, who desired to become such subscriber and was willing to comply with the rules and regulations of the company. A like duty rested upon the defendant company. By this contract, each company agreed not to discharge that duty as to anyone who was then a subscriber of the other company. This part of the contract, being prohibited by statute, is against public policy and void, without reference to whether the restraint be reasonable or unreasonable. 92 N. E., 206.

In addition to that, each company was granted the right by the public, and for the benefit of the public, to extend its lines and operate its telephone business over the entire territory occupied by the other. Being public service corporations, had they the legal right to contract not to so extend their lines and operations?

If the contract had provided for absolutely free, or even non-discriminatory service, between the two exchanges, then, so far as this provision of the contract was concerned, the contract would have been legal, for that would have been, in fact (in so far as the public duty was concerned), extending their lines and operation over the entire territory of each; but such was not

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the contract, and the discriminatory character of the contract is apparent in the situation now existing while both companies are operating strictly in accordance with the agreement. A subscriber in Medina is required to pay five cents to call up and talk with a subscriber of the plaintiff company, while the same subscriber of the plaintiff may call up and talk with the same subscriber at Medina free of charge.

It may be suggested that the companies owed no duty to make the service non-discriminatory as to the subscribers of both companies. Granting that that is so, while each company serves only its own subscribers and confines itself merely to the operation of its own exchange, it may well be said that by the enlargement of their operation and service, they enlarge the sphere of their public duty, and if they combine, as they may do under the statutes, to jointly serve the subscribers of both companies, then to the extent of the joint service, it seems to me, there must be no discrimination; at least, equity will not enforce a contract which provides for any discrimination in service among those similarly situated.

There is another feature of this contract, which raises a question which has been answered in different ways by different courts. The situation is that there is a group of independent country exchanges close together, and the city exchange at the county seat. The plaintiff, one of the country exchanges, bound itself by this contract not to connect with the other country exchanges. It also bound itself not to connect with any long-distance line that should be constructed in its territory.

Now, granting that under its charter powers, the plaintiff was not required to furnish a connection with a long-distance company, or to connect with its neighboring country exchanges, so long as it confined itself to the operation merely of its local exchange, can it be said that after connecting with one long-distance line, reaching the people in a certain territory, it is not its duty, on reasonable and fair terms to it, to connect its exchange with another long-distance line reaching the same or another territory, thus giving its subscribers an opportunity for competitive or enlarged communication with the outside world? Having permitted one long-distance connection, it had a right to

permit others, and was it not its duty to do so, in the sense of its not having a right to contract not to do so?

The provision in the contract which bound the country exchange not to "make any connection or interchange in telephone service with any person, firm or corporation operating any telephone lines within the territory" set apart and designated by said contract as the territory of either the plaintiff or defendant, not only bound the plaintiff not to give its patrons long-distance service except through the exchange of defendant, but it also bound the country exchange not to connect or co-operate with or exchange business with any rival company which should build an exchange at the county seat, and it bound the country exchange not to connect with its neighboring country exchanges. Having connected with one neighboring and outside exchange, to-wit, the defendant company, could it legally bind itself not to connect, upon as favorable terms, with its other neighboring exchanges?

There is a very able decision by the Supreme Court of Indiana, to the effect that the act of connecting with one neighboring exchange would enlarge plaintiff's duty and prohibit it from agreeing not to treat its neighbors, similarly situated, alike. *The State v. Caldwell*, 87 N. E., 644.

A later case, by the same Supreme Court, will be found, upon close examination, not to modify the above case. 92 N. E., 558.

A contraview is taken by the Supreme Court of New York, found reported in the 112 N. Y. Supl., 424.

The Ohio authorities are also in conflict, Judge Tayler adopting the Indiana view and the third circuit court, by a majority vote, taking the New York view. 16 O. Fed. Dec., 370; 13 C.C.(N.S.), 337.

In my judgment, Judge Taylor's opinion expresses a sound public policy, in keeping with the progress of the times. A public service corporation derives all its powers and its very existence from the public. Public policy demands that it charge such rates as will yield a revenue sufficient to enable it to supply the public wants, and at the same time enable it to earn a reasonable return upon the capital invested, and no more. Unmistakably, it is the policy of the public to bring public service corporations

under the supervision and control of public authorities, so as to limit them to a fair return for the capital invested. As this is accomplished, they become mere agents, to serve the public, and public policy demands that they furnish indiscriminate service, and that precludes all gifts or free service, which can not be furnished except at the expense of paying patrons.

This public policy, as to all public service corporations, was declared in statutory form by the last Legislature (102 Ohio Laws, p. 549). But as I have said, such public policy had been established as to telephone companies long before the present contract was entered into.

Both the plaintiff and the defendant by this contract agreed not to perform their public duty as to persons residing in territory along the Paradise road. Having combined to serve the subscribers of both companies, they agreed that such service should be discriminatory as between the subscribers of the two exchanges.

They each agreed not to build or operate in each other's territory, nor connect with the competitors of either, in such territory. The contract, therefore, is in some respects against the public policy of the state, and a court of equity will not enforce it in any part unless the good can be separated from the bad.

Here was a promise to do acts, some of which were legal and some of which were illegal, and the consideration for that promise on the part of the plaintiff was a promise on the part of the defendant to do several acts, part of which were legal and part illegal. The whole promise of one was the consideration for the whole promise of the other, and while the general rule is that wherever the unlawful part of the contract can be separated from the rest, it will be rejected, and the remainder enforced, that can not be done in a case like this. 20 O. St., 431; 117 Am. St., 479.

It does not take an acute mind to readily see that this contract would not have been entered into on the part of the defendant company but for these objectionable provisions, and the consideration being in part unlawful, the contract can not be enforced in any part.

The decree of the court therefore is that the petition of the plaintiff be dismissed.

LOCATION OF UNDERGROUND BAKERIES.

Common Pleas Court of Hamilton County.

JOSEPH BERNHARDT v. T. P. KEARNS, CHIEF INSPECTOR OF WORK SHOPS, ETC., AND W. C. FULSON, CHIEF SANITARY INSPECTOR OF THE BOARD OF HEALTH OF CINCINNATI.

Decided, January 12, 1912.

Bakeries—Location and Sanitation of—Injunction Does Not Lie to Protect a Baker Who Has Been Ordered to Remove His Bakery from Underground Room—Section 1012.

The arrest of one who is maintaining a bakery below ground would not cause him such irreparable injury as would warrant a court of equity in preventing a threatened arrest by injunction.

Powel Crosley and John C. Rogers, for plaintiff.

John Deasy, contra.

GORMAN, J.

Decision on demurrer to amended petition.

This is an action to enjoin the defendant, the chief inspector of work shops and factories, and W. C. Fulson, chief sanitary inspector of the board of health of Cincinnati, from ordering or attempting to compel plaintiff to remove his bakery and bake oven from the basement of his building No. 110 East McMicken avenue, Cincinnati, Ohio, where he has carried on the business of a bakery since 1890.

Plaintiff avers that his bakery is now and always has been conducted and operated under all reasonable and proper sanitary rules, regulations and orders of the board of health of the city of Cincinnati, Ohio, and is rated a number one or "AA" as a bakery; that the same has, during all the years since 1890, been conducted in said basement, and that he fitted up the same and thoroughly equipped it at great cost and expense, and has built up a large and valuable trade at said location, and has a valuable good will established, and that the location and ar-

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rangement of said bakery is thoroughly sanitary and healthful, and that he has a vested property interest in said bakery. He further avers that the defendants have notified him to remove his oven and bakery to some place above the level of the street; and that they will unless restrained, proceed to enforce said order to the great and irreparable injury of plaintiff in his vested property interests.

While the petition does not so state, counsel for plaintiff, in the argument of the case claimed that the defendants are doing and are intending to do the things complained of, under and by virtue of Sections 1012 and 1019 inclusive of the General Code, which are the sections relating to the manner of conducting bakeries and the sanitation and location of the same. Unless the defendants are proceeding under these sections of the code, then there is no warrant or authority of law for ordering plaintiff to remove his bakery.

While it is alleged that there is no law or warrant for defendants' actions in the argument of counsel, it is admitted that they are proceeding under these sections; but it is claimed that they are unconstitutional and void, especially Section 1012.

A demurrer has been interposed by the defendants; we shall therefore proceed to determine this case on the theory upon which it was argued and presented to the court, that the sections of the General Code above referred to are unconstitutional and void, and therefore there is no law or warrant for defendants' actions, and their threat to enforce the same.

It appears that these sections cited are the only ones under which defendants could assume to act lawfully in ordering plaintiff to remove his bakery from his cellar.

The grounds of the demurrer are:

1st. That the court has no jurisdiction of the subject-matter of the action.

2d. That the petition does not state facts sufficient to show a cause of action.

I shall proceed to consider these claims in the order stated and argued.

Section 1012 of the General Code provides that:

“All bakeries shall be drained and plumbed in a sanitary manner and provided with such air-shafts, windows or ventilating pipes as the chief inspector of work-shops and factories or a district inspector directs. No cellar or basement shall be used as a bakery.”

The following sections provide still further regulations for bakeries:

Section 1017 provides for an inspection of bakeries by the chief inspector and the issuance by him of a certificate to the owner that it is being conducted according to the provisions of the law. The next section provides that the inspector may issue an order to improve the condition of the bakery, and that a certificate of character (if I may so designate it) shall not issue until such order is complied with.

There is no method provided under the sections of compelling the compliance with the order, except by enforcing the penal provisions of the act which are set forth in Section 1019. It is there provided that whoever violates any of the foregoing provisions relating to bakeries, or refuses to comply with an order of the chief inspector, or district inspector, shall be fined not less than \$20 nor more than \$50, and not less than \$50 and not more than \$200 or imprisoned not more than ten days for each succeeding offense.

It will therefore be seen that a violation of Section 1012 is a misdemeanor and punished as such. There is no provision for arbitrarily removing any one's bakery from a cellar or basement.

There is no way in which the state officers or the health officers of Cincinnati can proceed against any one conducting a bakery in a cellar or basement, except by an arrest for a violation of any of the provisions relating to bakeries. No one is unlawfully attempting to take plaintiff's property or break up his business. At least the defendants are not claimed to be doing so, except in so far as an enforcement of the law against them may and will have that effect.

As the court views this case presented on the petition and the arguments of counsel for plaintiff and defendants, it is sought to enjoin these officers from prosecuting plaintiff criminally for an alleged violation of Section 1012 in conducting a bakery in

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a basement at No. 110 East McMicken avenue in said city. The court can not and ought not to be asked to assume that these defendants are about to deprive plaintiff of any of his property or constitutional rights, except by virtue of some statute which on its face authorizes them to proceed in the manner therein pointed out.

The plaintiff seeks by this proceeding to anticipate and prevent an arrest under the foregoing Section 1019, which may be, and will no doubt be made by defendant Kearns, as chief inspector of work-shops and factories of this state. There can be no other reasonable claim in view of the character of defendants, and the acts pleaded.

Now the first question to be determined is, "Has a court of equity power, authority or jurisdiction to enjoin the prosecution of any one under a criminal statute on the claim of the plaintiff that the statute is unconstitutional?" If this question be answered in the negative, then the plaintiff's petition must be dismissed and the court should not enter upon a consideration of the merits of the claim that the law is unconstitutional.

There can be no question of the soundness of the equitable maxim that courts of equity will not entertain jurisdiction in any case where the plaintiff has a plain and adequate remedy at law.

Now the constitutionality of Section 1012, or any other section allied to or connected with it, including Sections 1017, 1018 and 1019 can be tested in a criminal prosecution brought against plaintiff, or upon his arrest for an alleged violation of this or any other section of the code imposing a penalty upon conviction; he may, before being brought to trial, sue out a writ of habeas corpus and thereby test the constitutionality of the statutes under which the arrest has been made. See *Ex parte Kline*, 6 C. C.; *Ex parte Siebold*, 100 U. S.

So that in an attempt to enforce these statutes by the only method open to the officers, to-wit, by an arrest and prosecution for their violation, the plaintiff has two plain and adequate remedies at law.

An injunction will not lie to restrain a public officer or any one else from proceeding to a criminal prosecution for an alleged

violation of the criminal statutes. *High on Injunctions*, 4th Edition, Section 20; *Id.*, Section 68.

"Since courts of equity deal only with civil and property rights, they will not interfere by injunction with criminal proceedings, having no jurisdiction or power to afford relief in such cases. * * *

"So courts of equity will not interfere by injunction to restrain municipal officers from prosecuting suits for the violation of city ordinances, such proceedings being of a quasi criminal nature, and equity will not interfere with the execution of the criminal law, whether pertaining to the state at large, or to municipalities, which are agents in the administration of civil government." *High on Injunctions*, 4th Edition, Section 68; *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S., 207; *Moses v. Mayor*, 52 Ala., 198; *Taylor v. City of Pine Bluffs*, 34 Ark., 603; *C., B. & Q. R. R. Co. v. Ottawa*, 148 Ill., 397; *Golden v. City of Guthrie*, 3 Okla., 128; and numerous other authorities that might be cited.

Nor will an injunction lie to restrain an officer from making an arrest under a statute preventing cruelty to animals upon the ground that the acts complained of are not a violation of the statute, and because of the injury which would result to plaintiff's business. *Davis v. American Society*, 75 N. Y., 362.

Nor will a state officer be enjoined from enforcing a state law merely upon the ground of its alleged unconstitutionality. *Gibbs v. Green*, 54 Miss., 593; *Birmingham v. Cheetham*, 19 Wash., 657.

It is scarcely necessary to multiply authorities in support of this plain proposition. Courts of equity are entirely too prone to grant the request of each litigant who imagines that he can take some short cut to reach a decision favorable to him, or to forestall the proceedings of courts of law. It must be remembered that courts of equity and chancellors were brought into existence to give relief in those cases, and those only, wherein the law by reason of its universality was deficient.

When the forum of conscience is appealed to, to right an exceptional wrong which the legislators who enacted the law were unable to foresee, then the court of equity is acting within its proper sphere, but it ought never to act or take jurisdiction

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unless the applicant at its bar is without a plain and adequate remedy at law.

But it is urged that because the plaintiff's business may be incidentally affected by his arrest, therefore this court ought to interpose; or because the effect of the law if found to be constitutional, will be to deprive the plaintiff of his right of property, for this reason this court should hear and determine the question of the constitutionality of the law.

Counsel for plaintiff has displayed a wonderful amount of zeal and patience in collecting and citing authorities in support of his contention that where one's property, business or his civil rights are affected by a criminal prosecution, then an injunction will lie to determine the validity of the law under which the action is taken or attempted to be taken, even though the violation of the law involved is a criminal offense.

I have not the time or space to distinguish all the cases and authorities cited, but can only say that although there may be an occasional case in which an injunction has been issued by courts to protect property or civil rights, it will be found that they are cases in which the plaintiff's property was seized under an unconstitutional law, or the officers were proceeding in some illegal way to do the act or acts complained of, and irreparable injury was likely to occur unless the court of equity interfered. No such irreparable injury can take place here from the mere arrest of plaintiff, charging him with a misdemeanor.

Here are some of the cases cited by plaintiff's counsel:

Predigested Food Co. v. McNeal, Dairy Comr., 1 Nisi Prius, 266: Judge Smith on the Superior Court bench refused to enjoin the prosecution of plaintiff, although it alleged a conspiracy to break up its business on the part of the state officials and that they were acting maliciously and in bad faith.

Shaw & Simpkinston v. Interstate Savings Co., 5 N. P., 411, does not at all support plaintiff's claim. In that case it was urged that equity would not enjoin the commission of a crime, nor the prosecution thereof, and Judge Dempsey held that while equity would not enjoin the commission of a crime, it would protect property involved where a crime was involved.

Perkins, Campbell & Co. v. Rogg, 11 O. D., Reprint, 585, was an action to enjoin strikers from destroying property, and it

was held that because this was also a crime, it was no reason why a court of equity would not protect the plaintiff's property from destruction or injury.

State v. Hobart, 8 N. P., 246, was Judge Hollister's case granting an injunction against conducting a prize fight. This case can have no bearing upon the case at bar.

French v. Shirley et al, 7 N. P., 26, was a case to restrain the commissioners of fish and game of Ohio from summarily destroying plaintiff's property, fishing nets, under a statute which provided for their destruction without giving the owner a hearing or trial. This is not at all a case like the one at bar.

In *Board of Education v. Sawyer*, 7 N.P.(N.S.), it was charged that the law under which the state inspector was acting was unconstitutional and that the officers were acting arbitrarily and oppressively. In that case and under those allegations the court overruled a demurrer and allowed plaintiffs to show that the state officers were so acting. The court incidentally held the law to be constitutional, although it seems to me that that question was not necessarily involved in overruling the demurrer.

Millcreek Valley St. Ry. v. Carthage, 8 C. D., 840: In this case an injunction issued to restrain the village of Carthage from tearing up and destroying the tracks of the street railway company under a resolution declaring them to be a nuisance in the street, until there could be a judicial determination that they were a nuisance. The same question involved in this case was involved in the case of *Daming v. City of Cleveland*, 12 C. D., 198, a nuisance case.

A great mass of authorities from outside this state are cited. The court has been unable to examine all of them; but those examined are all to the point that a court of equity will enjoin in a criminal case to protect property, but no further.

No case will be found which is well considered that enjoins the criminal prosecution on the ground that the law is unconstitutional and void, unless it be to protect property or civil rights.

The demurrer will be sustained on the ground that the court has no jurisdiction of the subject-matter of the action.

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Cincinnati v. Street Ry. Co.

CONSTRUCTION OF PROVISION FOR A FRANCHISE TAX.

Superior Court of Cincinnati.

**CITY OF CINCINNATI, BY CHARLES J. HUNT, SOLICITOR THEREOF,
V. THE CINCINNATI STREET RAILWAY COMPANY AND THE
CINCINNATI TRACTION COMPANY.**

Decided, December, 1911.

Street Railway Franchise—Construction of, with Reference to Percentage of Earnings to be Paid to Municipality—Earnings of Interurban Companies Entering the City Over Tracks Covered by the Franchise Subject to Tax.

Under the franchise granted to the Cincinnati Street Railway Company, August 18, 1896, which provides that "the said company shall pay * * * five per cent. of its gross earnings to the city from every source of its said routes or lines of roads, or any extension thereof now owned or hereafter acquired by said company, and also all future extensions of any of said lines, and all future connections of said lines, within or without the corporation limits of the city of Cincinnati or within the county of Hamilton," the percentage is to be figured, not on the actual receipts of the company, but on its gross earnings, and "gross earnings" comprises all revenue which flows from the franchise itself, including gross earnings within the city limits of interurban companies which enter the city over the lines of the Cincinnati Street Railway Company under agreements entered into between the said company and interurban companies, notwithstanding the Cincinnati Street Railway Company receives from said interurban companies only a proportion of the earnings of the interurban companies within the city limits.

E. M. Ballard and Constant Southworth, for the City.

Miller Outcalt, Kittredge, Wilby & Stimson and Paxton, Warrington & Seasongood, contra.

HOFFHEIMER, J.

This is an action by the city of Cincinnati to specifically enforce the contract obligations of defendants under the fifty-year franchise granted by resolution of the board of administration, August 13, 1896, and under and by virtue of authority conferred in the act commonly known as the Rogers Law. As part of the

relief prayed for, plaintiff demands an accounting as to the franchise tax due it under its said contract, the amount due, so it alleges, being unknown to plaintiff.

The city in effect contends that the Cincinnati Street Railway Company and its lessee, the Cincinnati Traction Company, hereinafter referred to as defendant, is not performing its obligations under the franchise contract, in that it is not paying as the contract and its modification requires, namely, six per cent. per annum upon the gross earnings of all defendant's "routes or lines of roads" within the city of Cincinnati; the contention being that defendant by voluntary agreement with certain interurban companies permits such companies to use its routes or lines of roads on the payment by said companies of a percentage of the fares collected, and the relative fractional amount of the freight, and the claim is that defendant (in instances in which the traffic agreements are involved) thereupon pays to the city only on such amounts as it thus *actually receives*.

The city contends that the six per cent. should be calculated upon the gross earnings of the franchise for operating the "routes or lines of roads" no matter from what "source" they are collected or derived, thus including the part retained by the interurban companies. On the other hand, defendant denies that it is liable for any percentage upon the gross receipts or earnings derived from passengers and freight carried in the cars of the interurban companies within the corporate limits of the city of Cincinnati other than upon the proportion received by them, which conclusion is evidently based on certain matters set up in the answer, and to all of which plaintiff demurs as being insufficient to constitute a defense.

The question thus raised by the demurrer is one of prime importance, and it affects the right of the city to the enjoyment of benefits supposedly fixed by the fifty-year franchise granted defendant. A consideration of the question involves the construction and meaning of certain terms and conditions in that franchise, as well as their force and effect, likewise the change made by the modification of September 14, 1903, and the effect thereof, and also the traffic agreements entered into by and between defendant and the interurban roads, and the effect if any, of such agreements on the franchise granted to defendant.

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The original franchise granted defendant by the board of administration, August 13, 1896, contains the following:

"Said company *shall* pay * * * 5 per cent. of the gross earnings from every source of its said routes or lines of roads, or any extension thereof now owned or hereafter acquired by said company, and also on all future extension of any of its lines, and all future connection lines, within or without the corporation limits of the city of Cincinnati, and within the county of Hamilton, on which it has not made such payment."

In *Cincinnati v. Mt. Auburn Ry. Co.*, 28 Bull., 276, affd. 54 O. S., 645, the general term of this court in an able opinion by Rufus B. Smith, J., considering language not as broad as that here employed and involving a tax that was to be "2½ per cent. of the gross earnings from every source of such company;" *held*: that "Whatever earnings of the road are attributable to the city's grant, and are made from a use of that grant, must bear the 2½ per cent. burden."

This seems to me decisive of the contention here, particularly so, in view of the broader and more comprehensive language used in this grant. The question, therefore, is not one of actual receipts of the company, but gross earnings, and gross earnings must be considered as that which flows from the franchise itself, that which is "attributable to the city's grant" and made from and through the use of that grant.

Further, and as negating, if that were necessary, any idea of apportionment under traffic agreements, we find that the company shall pay 5 per cent. of the gross earnings from every source, of its said "routes or lines of roads," and also on *all* its said "routes or lines of roads, or any extensions now owned or hereafter acquired, and also on *all* future extensions of any of its lines, and *all* future connection lines, within or without the corporate limits of Cincinnati and within the county of Hamilton."

Certainly the earnings of the interurban companies, which are permitted by defendant to use its "routes or lines of roads" and to charge for and collect for the haul of passengers or freight over same, are a "source" of earnings directly "attributable to the city's grant." And I am unable to see wherein the legal

effect of the language of the grant is rendered less efficacious, because the defendant through a traffic agreement permits such road to collect for the use of its "routes or lines of roads"—a permission only made possible under plaintiff's grant to defendant. Finally, if more were needed, the 5 per cent. of earnings is due on *all future connection* lines within or without the corporate limits of Cincinnati and within the county of Hamilton, and are not the interurban roads fairly embraced within such language?

Now the modification referred to, appears in the ordinance of council, and evidences the consent of the city to receive from defendant, in lieu of the car license fees theretofore required under the franchise, an additional 1 per cent. per annum upon the gross receipts of the company.

It is argued by defendant that this modification changed the 5 per cent. on gross earnings in the original franchise to 6 per cent. on the gross receipts of the company. The answer does not so aver it, nor does that appear from the ordinance itself. This modification had nothing to do with the 5 per cent. clause. In view of the apparently more restricted language of the modifying ordinance it is barely possible that it was intended to restrict the additional 1 per cent. to amounts actually received by the defendant company. It would seem to me, however, in view of *Cincinnati v. Mt. Auburn Cable Ry. Co.*, (*supra*), and notwithstanding the narrower language used, that the language must be held to include all the receipts and earnings "as are attributable to the franchise" as in the 5 per cent. clause, and that it can not be restricted to the actual receipts of the defendant company. And even were the mind to rest in doubt about it, as against the beneficiary of a franchise of this character, such doubt must be resolved in favor of the city. *Blair v. Chicago*, 201 U. S., 400; *Cincinnati v. Mt. Auburn Cable Ry. Co.*, *supra*; *State v. Hudson River Tr. Co.*, 73 N. J., 227.

Now if the court is not thus far in error, it would follow that the terms and conditions of the franchise are not being complied with, when defendant pays as it states it does, 6 per cent. on the amounts it actually receives, instead of 6 per cent. on the gross earnings accordingly as we understand that to mean.

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The franchise granted by the city to defendant is a contract and it can not be altered without mutual consent. The legislation authorizing traffic agreements (May 17, 1894) was not intended to nor did it alter or affect the contract plaintiff has with defendant. That legislation simply made it possible for the urban and interurban road to make a lawful traffic agreement. *State v. Traction Co.*, 64 O. S., 272. This original contract does not control the interurban road; it does, however, impose terms and conditions on the defendant and it is these terms and conditions that plaintiff now seeks to enforce.

Under such a state of facts *Int. Ry. & Ter. Co. v. Cincinnati*, 75 O. S., 196, known as the "transfer case," and wherein it was sought to compel an interchange of transfers (relied on by defendant as deciding a question similar to the one raised here), can have no application. That case simply held that in the absence of an ordinance requiring street railroads in a city generally to exchange transfers, the power conferred by statute to enter into a traffic agreement was not conditional upon an exchange of transfers.

In this action the city seeks nothing from the interurban; its claim is against defendant solely.

The traffic agreements, therefore, which were made under authority of the legislation referred to, can not affect plaintiff's contract, the plaintiff not having been party thereto and not having approved of same in any manner whatsoever.

This being an action to enforce the terms and conditions of such contract, it follows that defendant can not by means of traffic agreements or otherwise disable itself or relieve itself from fully performing the covenants and restrictions that necessarily run with the franchise; nor can it evade any of the obligations thereunder by transferring any of its rights under the franchise (as by abandoning "a route" or part of a "route" to the interurban road), nor can it, in any manner make the contract less valuable to the city. *State, ex rel, v. Hudson River Trac. Co.*, 73 N. J. L., 227; *Joyce on Franchises*, Section 3, p. 205; *Ft. Worth Ry. v. Allen* (Tex. Civ. App.), 39 So. West, 125, 127; *Peoria & Rock Isl. Ry. Co. v. Coal Min. Co.*, 68 Ills., 489; *Thompson v. Schenectady Ry. Co.*, 131 Fed. Rep., 577; *Erie v. Erie Tr. Co.*, 222 Pa. St., 43.

In conclusion, I find myself wholly unable to agree with counsel for defendant that a construction that would compel defendant to pay 6 per cent. on gross earnings instead of on the amounts received by it would be "shocking in its unfairness and want of equity," for the reason, among others, that when the original franchise was granted, *Cincinnati v. Mt. Auburn Ry.* had already been decided; the legislation authorizing traffic agreements was in existence and defendant could have proposed other terms, *unless it was intended that the language used have the precise meaning given it.* Furthermore, since defendant voluntarily enters into the traffic agreements, it has it within its power to protect itself in the terms thereof.

On the other hand, it would seem to me, the injustice and "absurd consequences" would be on the side of the city, if a construction were to obtain that would make it possible for defendant, to alter or extinguish at will, the valuable benefits that were to accrue to the city—conditions annexed to the grant—whenever, or as often, as defendant chose to enter into traffic agreements, to which agreements the city was in no way a party.

What the court said in the *Mt. Auburn* case, with reference to the contention there, would seem to be pertinent here also:

"There is, too, a principle of construction with reference to statutes that will apply quite as well to ordinances that would forbid such a construction as is contended for by plaintiff. The principle is that:

"It is the plain duty of the courts in the interpretation of a statute unless restrained by the rigid and inflexible letter of it, to lean most strongly to that view which will avoid absurd consequences, injustice and even great inconvenience, for none of these can be presumed to have been within the legislative intent." (Citing *Moore v. Given*, 39 O. S., 663.)

For the reasons given, the answer, in my opinion, fails to set up anything sufficient to constitute a defense, and the demurrer is accordingly sustained.

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Guardianship of Connell

MAINTENANCE OF PROPERTY OF WARD.

Probate Court of Columbiana County.

IN RE JOHN M. CONNELL.

Decided, April, 1911.

Guardian and Ward—Premises of Ward Occupied by Guardian—Rental and Repairs—Account of Guardian Final Upon Confirmation as to Matters Adjudicated Unless Appeal is Taken—Sections 10969, 10972, 10991 and 10954.

1. It is the duty of a guardian to keep real estate belonging to his ward in reasonable repair; and where the property is occupied by the guardian, he is chargeable with a fair rental therefor, and he may deduct from the rental the cost of reasonable and necessary repairs made by him upon the property during his tenancy.
2. The cost of repairs of property of a ward should be made from the income of the ward's estate, or if the income is insufficient from the principal, leave so to do having been first obtained from the probate court.
3. Each account of a guardian with his ward, whether intermediate or final, upon confirmation becomes an adjudication of all matters between the said guardian and ward contained in the account, unless an appeal be taken, or a subsequent guardian during the minority of the ward, or the ward within two years after he arrives at full age, file a petition in the common pleas to open up and review the settlement for fraud or manifest mistake.

FARR, J.

This cause came on to be heard on the exceptions filed to the guardian's eighth account and to exceptions filed at a later date to the fifth, sixth and seventh accounts.

These exceptions were all presented at the same time and will be disposed of in like manner. The exceptions to the eighth account will be first considered.

Exception number one involves some fifteen items of various amounts for hardware, grass seed, wire for fence, labor in building fence, boarding, lumber, shade trees and plants.

The evidence of the guardian discloses, and it is the only evidence offered as to these charges, that the hardware was used in

and about the permanent improvements on the premises, some of which were necessary to be made, owing to the destruction of the old dwelling house by fire. No testimony is offered to the contrary and it is believed that credit should be allowed for the item and it will be so ordered.

There are several items for timothy and clover seed. The evidence of witness, McIntosh, was to the effect that in the locality of this farm it was the custom for the landowner to furnish grass seed and the tenant to sow the same without charge.

The witness, Moore, also substantially so testified and this was corroborated by S. George Connell. It is believed that this rule practically prevails throughout rural communities in this state where there is no agreement which otherwise provides. Any other rule would work hardship for tenants from year to year, if compelled to sow but not be permitted to gather the crop.

This was but a tenancy from year to year, although continuing for several consecutive years, yet it was liable to be terminated at any time should the death of John M. Connell occur. It is not disputed that the purchases of grass seed were made and credit will therefore be allowed for the amounts claimed.

There are also charges for fence wire, fence building and lumber. The evidence discloses and it was undisputed, that these expenditures were for the improvement of the ward's premises.

In *Giauque, Manual for Guardians*, Section 72, it is observed as follows:

"It is the guardian's duty to make the proper repairs on ward's real estate, and pay for them out of the income."

It will be observed that the author uses the language, "proper repairs," thereby suggesting good faith on the part of the guardian in that regard. Moreover, they are to be paid for out of the income, which no doubt indicates repairs of ordinary character such as fence building and small repairs to buildings, otherwise they would be designated as improvements.

In *Werner, Am. Law Guardianship*, page 22, it is also observed as follows:

"It is the guardian's duty to keep his ward's real estate in good repair and tenantable condition, if the means in his hands are sufficient for such purpose."

It is the guardian's duty to keep his ward's premises in good repair and thereby preserve the estate.

Rockel, Ohio Prob. Prac. likewise lays down the rule at Section 1394 as follows:

"It is the duty of the guardian to keep the ward's real estate in good repair and tenantable condition, if the means in his hands are sufficient, and if in consequence of his neglect in this respect, the premises are not rented, he is liable for the loss."

This seems to broaden the principle and make the guardian liable if he neglect such repairs, and the premises for that reason are not rented.

At Section 1432 the author further states: "It is the duty of the guardian to keep the ward's real estate in such condition that it will yield a reasonable income." * * * How else than by repairs could such condition be maintained?

In *23 Cyc.*, 87, the text-writer lays down the correct principle, and it is in point with the case at bar.

"If he occupies the premises himself, he is charged with rent, less the reasonable value of the necessary improvements made by him." See also *Werner*, 346; *Taylor v. Calvert*, 138 Ind., 67.

And why not? If the guardian make the improvements and pay the rent as any other tenant, he is entitled to enjoy the premises as any other tenant, in fair, tenantable condition.

Counsel for exceptor urges, however, that there is no implied warranty on the part of the landlord, where there is no fraud or concealment, that the premises are fit or unsuitable for the purpose for which they are leased, nor is there any implied covenant on his part to put or keep them in repair, and in support of this view cites *Shindelbeck v. Moon*, 32 Ohio St., 264; *Shinkle v. Birney*, 68 Ohio St., 328; *Campbell v. Luck*, 2 C.C.(N.S.), 129; *Linke v. Walcutt*, 5 C. C.(N.S.), 54, affirmed, *Linke v. Walcutt*, 69 Ohio St., 531; *Burns v. Lockett*, 3 Bull., 517; *McNeal v. Emery*, 8 Bull., 265, all of which cases correctly interpret the law and support his position; however, that is not the real question at issue here. The foregoing is only to the effect that there is no implied warranty that the premises are fit and suitable for the purpose for which they are leased or implied covenant to put or

keep them in repair; that is, that there is no legal obligation to do so or liability as against the landlord if not done but it is nowhere held that he may not do so. Indeed, it would seem, that to a reasonable degree at least he should do so.

The case at bar involves only the right of the guardian to make repairs, and in the light of all the foregoing it is believed that he had such right and the amounts claimed for reasonable repairs will therefore be allowed.

The item of eight dollars for boarding hands is not made clear by the evidence and it does not appear whether they were employed at work which would inure to the benefit of the ward's estate or at labor about the farm. It is left so much in doubt that it is believed the claim should not be allowed. If the item was to be charged against the ward's estate the guardian should have been able to recall the names of persons boarded and to state the character of the services rendered. His answer was that he did not just recollect. And the exceptions are therefore sustained as to that item.

There are two items, one for shade trees and one for plants. It is not believed that shade trees upon farm lands are of that character of improvement for which a guardian should expend fifteen dollars of the ward's money, especially where the estate is heavily incumbered, as in the case at bar. A half day's time and labor and a little good judgment on the part of the guardian, exercised in selecting a few fine young maples from a convenient grove, would doubtless have served the same purpose and been more commendatory of the guardian's management of the ward's estate. The character of the plants is not disclosed by the evidence unless when the guardian referred to strawberry plants, he had reference to the item in question. In any event it would be difficult to conceive how plants of any kind would be for the benefit of the ward's estate or, how, under the circumstances, they could be properly charged against it. The exception is therefore sustained to both items.

Exception is also taken to the several items included in the charge of forty-three dollars, for repairs made and labor performed by the guardian on the ward's farm consisting of build-

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ing fence seven dollars, roofing outhouse six dollars, labor and team two dollars and seventy-five cents, team two dollars, trimming orchard three dollars, planting shade trees one dollar, team work on fence row six dollars, cutting briars three dollars, repairs, door and porch one dollar and fifty cents, hauling rails two dollars, building fence seventy-five cents, piling lumber one dollar and fifty cents, repairing fence one dollar and fifty cents, hauling rails one dollar and fifty cents, repairing stable two dollars and twenty-five cents, repairing windows seventy-five cents.

The evidence with reference to these items was somewhat meager and indefinite because the guardian did not clearly explain or was not asked concerning each item.

The charge of six dollars, for roofing outhouse, and seven dollars for building fence, should be allowed because it was for the more permanent improvement of the ward's estate; but the other items for repairing fences, hauling rails, planting shade trees, cutting briars, making small repairs about porch, windows and stable, were doubtless such small changes or repairs as farmers usually make for their own convenience and special accommodation. Such charges should not be made against the estate and the exception is therefore sustained, except as to the items above mentioned.

Exception is also taken to the amount of two hundred and fifty dollars per year with which the guardian charges himself, as rental for his ward's farm for the two preceding years. The evidence of the witnesses, McIntosh and Moore, is to the effect that a fair rental would be two hundred and seventy-five dollars each, for the two preceding years. The farm contains 122 acres, is rather favorably situated with reference to markets, has a very good dwelling house and other buildings. The sum of two hundred and seventy-five dollars per year rental for the two preceding years would not be excessive or unreasonable. The exception is sustained.

The guardian will therefore amend his eighth account, increasing the charges against him by fifty dollars, and reducing the amount for which he asks credit by fifty-eight dollars.

The exceptor subsequently filed exceptions to the fifth, sixth and seventh accounts of the guardian, and said exceptions will be disposed of at this time. The seventh and next preceding account was filed ———, 19—, advertised according to law, and approved September 16, 1910. It is contended that such settlement was final and can not be reviewed in the manner in which the same is now sought to be done. As to the effect of a guardian's settlement with the court, General Code, 10954, provides as follows:

“The settlement in the probate court of the accounts of a guardian is final between him and his ward unless an appeal be taken therefrom to the common pleas court in the manner provided by law. But a subsequent guardian during the minority of his ward, or a ward, within two years after he arrives at full age, may open and review such settlement for fraud or manifest mistake by civil action in the common pleas court of the county in which it was made, or the county where the former guardian resides when the petition is filed, as the plaintiff elects.”

Counsel for exceptor cites Revised Statutes, 6304 (General Code, 10991) which reads as follows:

“All laws relating to guardians for minors and their wards, and all laws pointing out the duties, rights, and liabilities of such guardians and their sureties, in force for the time being, shall be applicable to guardians for idiots, imbeciles and lunatics, and their children, except as otherwise specially provided; but in the settlement of the accounts of such guardians, no voucher shall be received from or allowed as a credit to the guardian of any idiot, imbecile, or lunatic, which shall be signed or purport to be signed by such idiot, imbecile, or lunatic; and provided, that * * * any such receipt shall have been allowed as a credit to such guardian, shall be held and deemed absolutely null and void, and any settlement made by any such guardian shall, at any time within two years after the appointment of another guardian, or after the disability of such ward may be removed, or such ward may die, be opened up and reviewed, on the motion of such newly appointed guardian, or legal representative, or of any other interested person, notice of which motion shall be given by publication or otherwise as the probate judge may direct.”

The foregoing section was in part written into the General Code and numbered Sections 10991 and 10992, but all the latter part of said former Revised Statutes, 6304, after the word "lunatics" near the middle of the section and beginning with "and provided" was not rewritten into said General Code sections and is designated by the code commission "part obsolete." The part omitted was the part relied upon by counsel for exceptor as to the right to reopen accounts already approved. It does not apply here, but the determination of this case depended upon the construction of General Code, 10954, formerly Revised Statutes, 6289.

Rockel, Ohio Prob. Prac., Section 1494, construes Revised Statutes, 6289 (General Code, 10954) as follows:

The effect of the above section is to make such account, whether intermediate or final, a final account between the guardian and his ward as to every fact contained in the account unless an appeal be taken as provided by law. There is only one reservation to this rule, that is that the ward, within two years after arriving at the age of majority, shall have the right of opening the account for fraud or manifest mistake, by civil action in the court of common pleas. As to all matters contained in the account, the settlement becomes an adjudication."

In the case of *Woodmansie v. Woodmansie*, 32 Ohio St., 18, the second section of the syllabus construing said section reads as follows:

"Under the provisions of said Section 31, every settlement so made by a guardian is final between the guardian and ward, unless an appeal is taken therefrom, or the settlement is opened, in accordance with the provisions of this section."

In the case of *Eichelberger v. Cross*, 42 Ohio St., 549, 554, Judge Okey observes as follows:

"True, a partial account is conclusive unless attacked in the mode provided by statute."

Again, in the case of *Braiden v. Mercer*, 44 Ohio St., 339, 341, Judge Owen likewise construes said section:

"That the settlement was final as between the wards and their guardian's administrator in the absence of an appeal from

it or a proceeding to open it in accordance with the statutes, will be conceded." See also *Lynch v. Cogswell*, 18 C. C., 641, a case well in point.

In the case of *Errett v. Howert*, 78 Ohio St., 109, 111, the the syllabus reads as follows:

"Every settlement made in the probate court by a guardian is final between the guardian and ward, unless an appeal be taken therefrom to the court of common pleas or the same shall be opened and reviewed for fraud or mistake by civil action * * * commenced within two years after the ward shall arrive at full age. Section 6289, Revised Statutes, fixes the limitation for such action and not Section 4982."

It will be noticed that the foregoing makes every settlement final between the guardian and ward unless the statutory course be followed, and why not? There should be a concluding point in such matter as well as in any other.

General Code, 10991, provides as follows:

"Laws relating to guardians for minors and their wards, and pointing out the duties, rights and liabilities of such guardians and their sureties, shall be applicable to guardians for idiots, imbeciles and lunatics, and their children, except as otherwise specially provided."

The duties, rights and liabilities are the same unless otherwise specifically provided and there is no different provision in the case at bar. It follows, therefore, that the right to re-open said accounts must be denied and the exceptions to the same dismissed.

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State, ex rel, v. Dittey.

**PROCEEDINGS OF THE OHIO TAX COMMISSION SUBJECT
TO INSPECTION.**

Common Pleas Court of Franklin County.

**STATE OF OHIO, EX REL THE WITHWORTH BROS. CO., v. DITTEY
ET AL, BOARD OF THE TAX COMMISSION OF OHIO.**

Decided, November 25, 1911.

*Records—Right of Public to Inspect Public Documents—Proceedings of
Ohio Tax Commission Subject to the Same Rule.*

The proceedings of the Tax Commission of Ohio constitute a public record, and subject to proper regulations these records are open to inspection by any and all persons who choose to examine them, regardless of their interest or lack of interest in the subject-matter.

*T. E. Powell, for plaintiff.**T. S. Hogan, Attorney-General, contra.***RATHMELL, J.**

The relator prays for a writ of mandamus on the board of tax commission of Ohio to examine the records and reports of corporations.

The petition alleges that said board is a public board and as such has possession and control of the records and reports of all corporations doing business in the state; that these are public records, and examination of them by relator has been refused; that the purpose of the examination is for information in the publication of a business directory pertaining to corporations.

Defendants have filed a general demurrer to the petition. It is contended the relator has not shown such an interest as brings him within the common law rule, and that the absence of a statute giving such a right, and the provision of the law governing the commission denies him the privilege.

The common law rule contended for by defendants—that the right to inspect public records is confined to those who have an interest in the subject-matter to which the record relates—is not a general rule, and has not only been denied as obtaining in this

country (78 Mich., 363), but its application limited. And it pretty generally is held that subject to proper regulations and restrictions the public records are open to the inspection of any and all persons who choose to examine them, regardless of whether or not they have any definite interest in the subject-matter thereof. (24 Ency. of Law, p. 183.)

There is good authority it seems that where a person is by law or by authority of law required to make a report or return of his acts or a statement of facts, that such is a public record of such acts or facts. (24 Ency. of Law, 174, and com.; 34 Ill., 297, etc.)

The law governing the tax commission requires a sworn statement of certain officers constituting the reports sought to be inspected. The same law makes the record of the proceedings of the commission a public record. (Section 4, 102 O. L., 224.)

We are of opinion that the maxim urged by defendants does not apply so as to necessarily imply that these reports are not public records. It places beyond dispute that *the record of proceedings of the commission is a public record*. The reports are not robbed of their public character under the other rule cited in the absence of an express exclusion by the statute.

We are unable to discover any special secrecy as to the reports on the part of the commission revealed in the statute; or any very good reason for withholding inspection in view of the claim that for years similar reports have been treated as public records when made to the auditor of state. We are of opinion that the pleading on its face makes a showing of a right to examination prayed for and that the demurrer is not well taken, and same is overruled.

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REMOVAL OF GARBAGE.

Common Pleas Court of Cuyahoga County.

J. L. STADLER V. CITY OF CLEVELAND.

Decided, December 8, 1911.

Removal and Disposal of Garbage and Other Refuse Matter—Power of Municipalities with Reference Thereto—Limitations as to Articles which May Be thus Classed—Impairment of Contracts—Constitutional Law.

1. The authority which is vested in municipalities to control the collection and reduction of garbage and offal does not include the right to take, without compensation to the owners, slaughter-house offal and other articles of a sanitary character, unless such articles are mixed with garbage and other matter which is noxious and dangerous to health and life.
2. One who has existing contracts for the removal of slaughter-house and other offal of a sanitary character, and possessing value, may enjoin the enforcement of an ordinance in so far as it is in impairment of his contract obligations.

Westenhaver, Boyd, Rudolph & Brooks, for plaintiff.
City Solicitor, contra.

FORD, J.

It was sought in this case to enjoin the city of Cleveland and its officers from interfering with the plaintiff in the prosecution of his business of collecting dead animals and transporting them to his plant, for the purpose of reduction into marketable products, and also from collecting animal and vegetable matter from hotels, restaurants, butcher shops, etc., for a like purpose. The ordinance under which the city claimed to be acting was Sections 1683-4-5 of the ordinances of Cleveland.

No doubt the statutes of the state of Ohio afford ample authority to the defendant to pass an ordinance of the kind in question to control the collection and reduction of garbage and offal. No doubt there is authority in the statute to provide for a monopoly by the city for such municipal service, and that parties may be penalized for interfering by collecting such garbage or

carrying the same over the streets, and these propositions are amply supported throughout the various states by able and well-considered authorities; but the garbage or offal, which is the subject-matter of the legislation in question, must be matter that is of necessity accumulated in connection with domestic life and housekeeping, hotel, and restaurant, *i. e.*, where human food is prepared for immediate table consumption; and such matter must be matter that is substantially worthless and of a kind that is presently or potentially offensive or noxious and dangerous to life and comfort of society.

When, however, an ordinance of the kind in the case at bar is passed, which includes, under the term "garbage and offal," articles that are commodities in the market, and that are sanitary, and in no way threatening to the public health, such as dead animals in the possession of their owners, and such commodities as "slaughterhouse offal," which, by the testimony, is a known article of commerce in this city and community and running into the values of hundreds of thousands of dollars, when such articles as these are included in an ordinance, such ordinance, if not altogether void, is at least void as far as the articles just enumerated are concerned. This is on the ground that, under the terms of this ordinance, the city is authorized to take possession of these from the citizens without giving compensation, which is unnecessary, unreasonable and in violation of the Constitution. This view is supported by authority. See *Dillon on Municipal Corporations*, fifth edition, Sections 678 and 679, which are as follows:

"Section 678. [*Removal and Disposal of Garbage and Refuse Matter.*] The removal and disposal of garbage, offal, and other refuse matter is recognized as a proper subject for the exercise of the power of a municipality to pass ordinances to promote the public health, comfort, and safety. The natural scope of an ordinance on this subject is confined to discarded and rejected matter, *i. e.*, to such as is no longer of value to the owner for ordinary purposes of domestic consumption. If the matter in question has not been rejected or abandoned as worthless and is not offensive in any way to the public health, it does not come within the natural scope of such an ordinance. Garbage matter and refuse are regarded by the decisions as inherently of such a

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nature as to be either actual or potential nuisances, by reason of the inherent nature of the substance. It is therefore not a valid objection to an ordinance requiring disposal in a specified manner that garbage has some value for purposes of disposal, and that the effect of the ordinance is to deprive the owner or householder of such value. That the owner suffers some loss by destruction or removal without compensation is justified by the fact that the loss is occasioned through the exercise of the police power of the state, and the loss sustained by the individual is presumed to be compensated in the common benefit to the public.

"Founded upon the foregoing considerations, it is therefore within the power of the city not only to impose reasonable restrictions and regulations upon the manner of removing garbage, but also, if it sees fit, to assume the exclusive control of the subject, and to provide that garbage and refuse matter shall only be removed by the officers of the city, or by a contractor hired by the city, or by some single individual to whom an exclusive license is granted for the purpose. An exclusive right so created is not open to the objection that it is a monopoly.

"An ordinance of a city prohibiting, under a penalty, any person, not duly licensed therefor by the city authorities, from 'removing or carrying through any of the streets of the city any house-dirt, refuse, offal, or filth,' is not improperly in restraint of trade, and is reasonable and valid. Such a by-law is not in the nature of a monopoly, but is founded upon a wise regard for the public health. It was contended that the city could regulate the number and kind of horses and carts to be employed by strangers or unlicensed persons, as well as they could licensed persons; but practically it was considered that the main object of the city could be better accomplished by employing men over whom they have entire control, night and day, who are at hand, and able from habit to do the work in the best way at the proper time."

"Section 679. [*Removal and Disposal of Carcasses of Animals.*] The weight of authority seems to have differentiated the removal and disposal of carcasses of animals from the removal and disposal of garbage and refuse matter. A dead animal is not *per se* a nuisance, and is not necessarily dangerous to the public health. The carcass of a dead animal, from whatever cause the death may have ensued, has some value to the property owner, and of this value he can not be deprived without due compensation. Hence, under statutory authority, while the city may require the removal of a dead animal beyond the city limits within a reasonable time and to a specified reasonable distance, and in default thereof may deal with the carcass as a nuisance and take

it and make such disposition as may be necessary for the public health, these or similar regulations appear to mark the limit of legislative and municipal authority. To justify the seizure and removal of a carcass by virtue of police power, it must be shown that the dead animals are, or will become in some way, dangerous or deleterious to the public health. Therefore all ordinances and regulations which result in depriving the owner of his property in the dead animal without compensation, whether it be by prohibiting him from removing the carcass, or requiring him to pay a public contractor for its removal, or by making it unlawful for any person other than the public contractor to remove and dispose of the carcasses, are in excess of the legislative power, and unconstitutional and void."

If, as in Section 679 just quoted, "an animal is not *per se* a nuisance, and is not necessarily dangerous to the public health," so those portions of animals fresh slaughtered that are entirely clean and in healthful condition, and not affected by contagious diseases, have value—and from the testimony have great value—and an owner can not be deprived of such property without due compensation.

It is contended in this case by the city that, conceding all this the court has said to be true generally, this plaintiff has not the right to assert such a claim, because he is not in fact, or has not been, and by the terms of the ordinance will not be deprived of property; that such a claim can only be asserted by the various persons from whom property might be under the ordinance taken.

To support this view of the city, it has cited 199 U. S., 306. While the ordinance in that case is very different from the one in question, dealing apparently only with matter that is strictly discarded and rejected matter, while in the ordinance under consideration matter is included that is not *per se* a nuisance and not necessarily dangerous to the public health, yet it is no doubt the duty of the court to follow that authority and find that plaintiff is not entitled to the relief asked for that reason.

The plaintiff in this case sets out the ordinance, which in part is as follows:

"Section 1683. The director of public service shall collect and dispose of, through the department of public service, all gar-

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bage, hotel and house offal, *slaughter-house offal*, refuse animal and vegetable matter, dead animals or parts thereof not killed for human food, and animal offal, excepting manure, within the city of Cleveland wherever found."

The plaintiff sets out in his petition that he has contracts with various persons in the city for the purchase and disposal of *slaughter-house offal*, and charges further that said contracts, in so far as they relate to butcher shops, meat markets and slaughter houses and slaughter house offal, include the collection by plaintiff and the delivery to him by said parties of the bones, feet and heads of animals which have been slaughtered for human food; and charges that the city of Cleveland, through its heads of departments, has threatened and is about to forcibly prevent plaintiff from purchasing, taking possession of and transporting or manufacturing said *slaughter-house offal*, and has threatened to and is about to use the police force and sanitary police force to prevent the plaintiff from possessing himself of or transporting to his plant said *slaughter-house offal*; and that, as a result of such purpose on the part of the city, and said threats, and that in carrying out the ordinance in question, his constitutional rights are invaded, for the reason that such ordinance impairs the obligations of contracts.

The city, in its answer, admits the ordinance, admits that the commodity known as "*slaughter-house offal*" is included in the ordinance, admits that it does purpose to prevent plaintiff from carrying out such contracts, and is threatening by its police departments to prevent plaintiff from possessing himself of the *slaughter-house offal* and transporting the same through the streets.

In view of this state of the pleadings, and the proof adduced upon the trial and heretofore referred to, the court is of the opinion that the ordinance is in violation of plaintiff's constitutional rights in that it is an impairment of his contract rights, and is therefore unconstitutional, and the plaintiff is entitled to the relief prayed for in this action.

Our own circuit court, in a case recently decided, in an ordinance substantially like the one in question, has found that such

an ordinance is unconstitutional and void in so far as it includes dead animals.

It may well be, if the court is right in this case, that including slaughter-house offal in the ordinance is unconstitutional as impairing plaintiff's contractual rights, and that it is unconstitutional in that it includes dead animals, that the legislative body, the city council, may desire to provide a new legislation; but, on the other hand, it may be entirely practical for the city to operate successfully under the present ordinance notwithstanding the finding of the court in this case and the finding of the circuit court in respect to dead animals, and the court will, therefore, not find that the whole ordinance is unconstitutional and void, except in respect to the inclusion of matter denominated slaughter-house offal.

It was developed in this case that plaintiff had contracts for the removal of garbage from apartment houses; that he has an arrangement whereby the janitors, perhaps, collect into one place or into one receptacle all the garbage accumulating from various tenants occupying such apartment houses, and that plaintiff is carrying through the streets of the city such product and disposing of it at his disposal plant.

Experience has clearly demonstrated that the conducting of every household in which meals are prepared for the members thereof must of necessity result in the collection of discarded and rejected matter that is of the kind that has not an appreciable value to the owner. Any household where meals are prepared—and that would include hotels, restaurants, eating houses and boarding houses—must of necessity accumulate some matter of the strictly garbage kind; and any such homes or hotels that do not make such accumulation, which accumulation would be properly disposed of only by the city, is making, of necessity, some disposition of such matter as would be in violation of the legal and constitutional provisions of the ordinances in question. The fact that such collection has some small value does not prevent the city from passing an ordinance giving the city the exclusive right to dispose of such matter.

In the case of *Gardner v. Michigan*, just quoted, 199 U. S., 325, it is said:

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"The court may well take judicial notice that table refuse, when dumped into receptacles kept for that purpose, will speedily ferment and emit noisome odors calculated to affect the public health. If, in providing against such nuisance, the owner of such material suffers some slight loss, the inconvenience or loss is presumed to be compensated in the common benefit secured by regulation."

The court does not, however, mean to say that hotels, restaurants, boarding houses, or even private houses may not keep separately and in a sanitary way portions of food not desired by the owners for table purposes. It is only when the good is mingled with the garbage and offal proper that the whole may be seized upon by the municipality; and this view is amply supported by the authorities. In 68 Conn., 101, it is said:

"A municipal ordinance defined 'garbage and offal' as such refuse matter as accumulates in the preparation of food for the table."

In considering the validity of the ordinance, which also licensed a single contractor for its removal and prohibited any person from removing it without a license, Baldwin, J., said:

"Construing this ordinance with the strictness properly applicable to municipal legislation of a penal nature, the term 'refuse matter' can only extend to matter which is in fact noisome, or which has been refused and rejected by the owner as worthless. Meat trimmings, potato parings, speckled apples, and many other things of a like character, might be thrown aside in preparing table dishes, and yet properly utilized afterwards for other purposes."

And in 123 Mich., 570, the ordinance defined garbage and offal to include every accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends the preparation, use, cooking, dealing in, or storing of meat, fish, fowl, fruit, or vegetable, and provided for its disposal in a specified manner. In defining the scope of the ordinance, Long, J., said:

"The ordinance does not attempt to regulate in any manner whatever the disposition of wholesome substances by the householder. It is aimed only at refuse; that is, discarded worthless

matter—matter unfit for food. The householder has perfect liberty, under the ordinance, to consume, or to sell or give away, all the leavings of his table or kitchen that are fit for food; but he is not suffered by the ordinance to have around his premises, in open buckets, pans, pails, or heaps, that which is known as 'refuse.' "

And in the 68 Conn., 101, above quoted, the court say:

"The ordinance does not extend to every thing that is separated and thrown aside in the preparation of food for the table. Whatever of this description is not abandoned as worthless remains property which, so long as it does constitute a nuisance, may be sold or otherwise disposed of at the will of the owner."

Clearly, if the good and sanitary is kept apart from the bad and dangerous material, the former is a proper subject for sale as the owner may see fit. It is the mingling that makes it contraband.

In 20 App. (D. C.), 477, it was said that when good food matter is mingled with garbage, it becomes subject to public control in the same manner as garbage properly so-called, notwithstanding that in some instances the owners might be able to dispose of it in its unreduced state as either animal food or manure.

To the extent that plaintiff collects material of the kind just indicated, he is himself, as the court believes, violating the legal portion of the ordinance. Whether, because in the trial of the case it has been disclosed that plaintiff is in this respect violating the ordinance, he is not entitled to the relief asked for, the court is in some doubt; but, on the whole, the court does not believe that he should be deprived of the relief asked for on this account; and the court finds, therefore, that defendants should be restrained and enjoined from interfering with plaintiff's business with respect to his purchase and transportation of the matter as hereinbefore indicated by the court.

Decree accordingly.

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LIMITATIONS ON THE CIVIL RIGHTS ACT.

Common Pleas Court of Franklin County.

GRAHAM DEUWELL V. GEORGE FOERSTER ET AL.

Decided, January 25, 1912.

Civil Rights—Character of Business in which Discrimination May and May Not Be Shown—Public Accommodations Do Not Necessarily Make a Public Place—When Service May Be Refused Without Regard to Color, Nationality, Religion or Station in Life.

An action for damages will not lie under the civil rights statute for refusal to serve a colored man a glass of soda from a soda fountain maintained in a candy store maintained by the defendant.

J. A. Miles, for plaintiff.

G. E. Trump, contra.

KINKEAD, J.

Plaintiff, a colored man, brings this action under the civil rights statute for damages for the refusal of the defendants to serve him with a glass of soda water at their soda fountain. The defendants maintain a candy store and soda fountain.

The case was tried to a jury. At the close of plaintiff's testimony, the court sustained a motion to direct a verdict in favor of the defendants. A motion for new trial was made.

The civil rights statute provides equal privileges in "an inn, restaurant, eating house, barber shop, public conveyance by land or water, theatre or other place of public accommodation and amusement."

The civil rights statute had its origin in the common law principle that inns, hotels and public carriers held themselves out for the service of the general public, that is, the masses, everybody. The idea was, and is, that all classes of people at some time or other will need the services of the proprietors of such places and instrumentalities. They hold themselves out for the service of everybody alike. The service in such places and instrumentalities is wholly unlike the service of a candy store or a soda fountain, or a hardware store, and the like. It is not everybody

that has a taste or desire for candy or soda water. This comparison shows the material distinction between the two classes of business, the one being clearly public, and the other being clearly private and individual.

The law impressed those engaged in the business of maintaining inns, hotels and public carriers with a duty to the general public, *quasi* public in its nature, that they should serve the public without discrimination. When colored people were clothed with citizenship, it necessarily followed that they were entitled to the same rights as other citizens. Legislation being necessary to secure these rights, it was first directed toward those engaged in the business of furnishing public accommodation in hotels and public carriers. Inns, hotels and public conveyances have always been considered as places of public accommodation in the broadest sense, both at common law and in this country, because they have always been denominated as such under the common law. The other places mentioned in the present statute, such as barber shops, and in some statutes in other states, bath houses, are not in the same class at all with hotels and public conveyances, and would not have been regarded as included within the statute under the general phrase contained therein, "and all other places of public accommodations." If a soda fountain, or a bath house, or a barber shop, or any other individual business may be considered as being within the purview of other places of public accommodation, then there would be no necessity for mentioning those places in addition to the hotels and public conveyances. There is no relation whatever between a soda fountain, so far as the public is concerned, analogous to that existing between hotels and public conveyances, nor even with barber shops.

As stated in one decision:

"There is, it is true, a superficial resemblance between the occupation of a barber and that of a bootblack in the sense that both minister to the personal comfort and convenience of others, but the same argument may be extended far beyond the limits necessary to demonstrate that 'all other places of public accommodation' are included by relation within the category of the things specifically enumerated in the statute.

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"The Legislature seems to have had no difficulty in naming a variety of places and callings that have never been regarded as places of public accommodation under the common law." *Burks v. Bosso*, 180 N. Y., 341.

An instructive case is found in *Cecil v. Green*, 60 Ill. Ap., 61, where it was held that "an apartment where only refreshing drinks are sold at a single stand (in this case a soda fountain) by the glass, does not come within the specific designation of a restaurant, eating house, or place of public accommodation within the civil rights act."

In the discussion by the court it was reasoned that if the word "accommodation" as defined in the dictionaries was to be used in the interpretation of the statute, this would include every article of property that is a subject of sale, but that it was not understood that places where dry goods, groceries, hardware or other like articles of accommodation, are places of public accommodation. The proprietor in running his soda fountain dealt not with masses as such, but with individuals, one at a time, just as merchants do generally. All the accommodation sought or furnished was a glass of drink; that which accommodated one never accommodated another. The place maintained by the defendants was not public or common, but private, exclusive and individual.

It is not the public character of accommodation that makes the place a public place, because if it was, then every place in which any article is sold to individuals generally is within the statute, and no merchant in any line of trade could lawfully decline to sell to any citizen for any reason not applicable alike to all.

Another idea that should be applied in the construction of this statute is that the phrase "public places of public accommodation" although it is very general in its nature, in its special meaning and application in cases brought under it, it is to be limited by the specific designations which precede it. And the designations which precede it are hotels and public conveyances which are concededly of a public character. And the later additions of hotels, eating houses and barber shops are much more analogous to hotels and public conveyances so far as their

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duties toward the public than is a soda fountain or a dry goods store or a hardware store.

The conclusion is that a soda fountain is not within the meaning of this statute, and that a proprietor of such a place has the absolute right to decline to sell to white, black, German, Irish, Catholic or Protestant, or any class of persons which he may choose to decline to serve, without giving rise to any right of action.

The motion for a new trial is overruled.

**STATUS OF PURCHASERS AT JUDICIAL SALE WHO
FAIL TO TAKE PROPERTY.**

Common Pleas Court of Hamilton County.

ELIZABETH OSTERFELD ET AL V. KATHERINE GRIMMINGER ET AL.

Decided, January, 1912.

*Judicial Sales—Purchaser Who Fails to Take Not in Contempt, When—
Rigor of Former Rulings Relaxed—Application of the Doctrine of
Caveat Emptor—Unmerchantable Title—Fair Dealing.*

In the interest of justice and fair dealing a court, in the exercise of a sound discretion, will not punish as for contempt a purchaser at judicial sale for declining to take the property, where reasonable question exists as to the marketability of the title; and in a partition sale the fact that the decree was prematurely entered is a sufficient ground for overruling a motion to punish the purchaser for the failure to take the property.

Galvin & Bauer, for motion.

Frank H. Kunkel, contra.

GORMAN, J.

Heard on motion to require purchaser, George Weber, to show cause why he should not be punished for contempt of court for failure to pay the purchase money.

This is a proceeding in partition. The commissioners appointed by the court made a return that the property could not be divided by metes and bounds, and appraised the same at \$2,-

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000. An order of sale was duly issued and the property put up and sold by the sheriff after duly advertising the same. George Weber bid therefor \$1,810 and the premises were struck off to him. He deposited \$100 on account of the purchase price, and has now refused to pay the balance, \$1,710. Plaintiffs have filed a motion to require him to show cause why he should not be punished as for a contempt of court in thus failing to pay the balance of said purchase money.

The question has been argued and submitted to the court, upon the theory that the order has issued and Weber is in court by himself and counsel to show cause why he should not be held to pay in the money and accept the property.

The purchaser has pointed out several defects which he claims exist in the title to the property, but the court is not disposed to attach much, if any importance to any of these, except the objection that the petition fails to allege that there are no debts of Maria Katherine Theis unpaid, or that there is sufficient personalty out of which to pay her debts, etc.

Now the record, the petition and the decree for partition set out that the husband, Henry Theis, died in 1901 intestate leaving the premises described in the petition, and that the plaintiff and defendants are his heirs at law, and that they are tenants in common and entitled to partition.

The petition avers that if Henry Theis left a last will and testament and the same be still in existence, the said Maria Katherine Theis was the sole beneficiary thereunder.

The petition was filed December 10, 1910, one month after the death of Maria Katharine Theis, and a decree of partition was entered April 20, 1911, within one year of her death.

The evidence or the agreed statement of counsel on this motion shows that after the filing of the petition herein, the last will of Henry Theis was produced and probated in this county about September 22d, 1911, and by its provisions the widow, Maria Katherine Theis, was his sole devisee, and the property in question was thereby devised to her. The sale to Weber by the sheriff was made on June 22d, 1911.

By the provisions of Section 12028, General Code, a partition of an estate which comes to the tenants in common by descent

or devise, can not be ordered by the court within one year from the death of such person, unless the petition set forth and it be proved that all debts against the estate are paid or secured to be paid, or that the personal property of the decedent is sufficient to pay them.

Now as to Maria Katherine Theis, through whom these tenants in common hold, there was neither such an allegation nor such proof, although the decree was taken within one year of her death. I am of the opinion that the court had no jurisdiction to decree the partition at the time it was entered in this case. At least, because of the premature entering of the decree, I am of the opinion that the purchaser was justified in objecting to the sufficiency or marketableness of the title.

Now it is true that under Section 11687, General Code, a purchaser may be punished as for a contempt for refusing to pay in the purchase money.

It is also true that even if the purchase money be paid in, it is a matter resting in the sound discretion of the court, whether or not it will confirm a sale on motion to confirm or motion to set aside the sale. See Section 11688, General Code, as to writs of execution, sale and confirmation, and this section also applies to all judicial sales. See also Section 12038 as to confirmation of sales in partition. Under the facts in this case, I do not think that a court should require the purchaser to take the property or pay in the purchase money, if the court has any discretion in the matter, or the purchaser has any standing in the court to resist the confirmation of the sale or the order to require him to pay into court. There is a conflict of opinion in this state as to the question of whether or not a purchaser has any standing in court to object to the confirmation of the sale. But it seems to be well settled that the court has a sound discretion to confirm or set aside a judicial sale whether the purchaser has a standing in court or not. See *L. I. & T. Co. v. Goodin*, 10 O. S., 557, where the court on page 566 says:

“All such sales (judicial sales) whether by judgment or decree are regulated by the same statute, and the power of the courts is very properly limited to a confirmation or vacation of the sale as to which they are to exercise sound legal discretion,

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and in which all parties, the plaintiff, the defendant and the purchaser may be heard. The power is to confirm or set aside, but not to modify the sale or its terms."

See also *Mechanics S., B. & L. Ass'n v. O'Conner* 29th O. S., 651, where the court on page 656 says:

"If before the sale was confirmed by the court, the defendant (the purchaser) had applied for relief and had moved the court to set aside the sale, the court in its discretion might have done so," etc.

To the same effect is *Dresbach v. Stein*, 41st O. S., 70, page 78. Other cases to the same effect might be cited from other states, but I am satisfied that the cases cited establish the rule that the court has a sound discretion to confirm or set aside a judicial sale on motion to confirm or set aside.

Now there appears to be no unanimity of opinion in this state as to the right of a purchaser to be heard either in favor of or against the confirmation of a judicial sale, although the rule outside of this state seems to be quite firmly established, that in the interests of justice and fair dealing, he has and should have that right.

In *Corcoran v. Pacific B. Ass'n*, 5 Bull., 712 Judge Avery, announcing the opinion of the district court of this county, held that the purchaser had no standing in court to be heard on the confirmation of the sale. And to the same effect is the case of *Brickell v. Miles*, 2 N.P.(N.S.), 153 a decision by Judge Bigger of the Franklin Common Pleas Court.

But the general term of the superior court in *Marshall v. Flinn*, 1 C. S. C. Rep., held that the purchaser has a standing in a court and a right to be heard and object to the confirmation of the sale, or to urge its confirmation, and this decision appears to me to be in accord with the statements of the Supreme Court in the cases above cited (10 Ohio State and 29 Ohio State), and also in accordance with the dictates of natural justice and the rule that the courts should seek to do justice between all the parties or persons interested in the subject-matter of the litigation.

There is no doubt of the correctness and universality of the rule of *caveat emptor* applying to purchasers at judicial sales in all its rigor, but this does not mean that, before confirmation, a purchaser may not be relieved from taking real estate purchased by him at such sale, if there be a question of the marketableness of the title or the jurisdiction of the court to decree the sale.

After confirmation, he can not be relieved because of this hard rule that the purchaser buys at his peril, and takes only such title as the sheriff has to give.

There are many instances of unreported cases in our local courts, wherein the court relieved the purchaser from taking the property bought by him at judicial sale. I should be very loth to confirm a judicial sale, if there was any reasonable question as to the marketability of the title. I think there are reasonable grounds in this case for the purchaser's attitude, and although I might punish him for refusing to pay in the purchase money, because strictly and technically speaking he may be bound to pay in, because he bid upon the property and it was struck off and sold to him, and his failure to pay the sheriff is a contempt of court, in that, his conduct in bidding and not taking the property and paying therefor, is an interference with the processes and proceedings of the court; nevertheless, if on a motion to confirm this sale, or a motion to set it aside I would not confirm the sale, the purchase money would have to be returned to the purchaser.

It is not the desire of this court, nor should it be the purpose of any judge, to inflict punishment on any one merely for the sake of punishing, if no practical or salutary result would follow the punishment. In this case, I am of the opinion that substantial justice and fairness requires this sale to be set aside, and the record of the case put into such shape as will leave no reasonable grounds of objection to the subsequent purchasers—if such there may be—of these premises.

In view of the opinion here expressed, I do not think that a rule should issue to require the purchaser, Weber, to show cause why he should not be punished as for a contempt, and the motion for the rule will therefore be overruled.

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TRANSFER OF COUNTY FUNDS.

Common Pleas Court of Franklin County.

THE STATE OF OHIO, EX REL EDWARD C. TURNER, PROSECUTING
ATTORNEY, v. FRED M. SAYRE, AS AUDITOR OF FRANKLIN
COUNTY, ET AL.

Decided, December 26, 1911.

*Authority of County Commissioners and Auditor to Transfer Funds—
Powers Must be Strictly Construed—Procedure in Common Pleas for
Obtaining an Order for Transfer—Exhausted Funds—Unexpended
Balances—By Whom Funds May Be Transferred—Taxes from
Specific Levies—Transfer of Surplus from Special Loans—Sections
2443, 5639, 5654, 2296 and 2571.*

- There is no statutory authority whereby the county commissioners and auditor, for the purpose of meeting present needs by replenishing exhausted funds, may transfer to such funds either receipts in bulk from undivided taxes, or from the sale of bonds issued for a specific purpose, or from duplicate tax payments, or from the floating debt, depository interest or election funds, and an attempt so to do is void, and moneys so attempted to be transferred should be restored to the funds to which they belong; but funds arising from fees paid into county offices may be so transferred.

*Edward C. Turner, Herbert C. Sherman, Henry S. Ballard,
Wilbur E. King and John G. Price, for plaintiff.*

Charles J. Pretzman, contra.

BIGGER, J.

This action is brought by the prosecuting attorney under favor of Section 2921 of the General Code, which makes it the duty of the prosecuting attorney, when he is satisfied that funds of the county in the hands of the county treasurer or belonging to the county are about to be or have been misapplied, to apply to the court for an order restraining such misapplication.

Without undertaking to state all of the averments of the petition, it is averred in substance that in seventeen of the county funds there is an overdraft amounting to the sum of \$233,741.44. It is then stated that there should be in the treasury at the time of the filing of the petition in certain funds, naming them, the sum of \$515,063.75. and that in fact there is in the treasury al-

together in cash, including the amount in depositaries, a total sum of \$447,455.38, leaving a deficit in these funds as a result of such overdrafts of \$67,618.37. It is then stated that the county commissioners have attempted by resolution to transfer to the general county fund the following sums from the following funds:

Duplicate Tax Payments	\$ 1,033.19
King Avenue Bridge Fund	40,000.00
Cleveland Avenue Bridge Fund	30,000.00
Tax Inquisitor's Fee Fund	52,531.81
Election Fund	1,000.00
Floating Debt Fund	296.42
Depositary Interest Fund	10,121.75
Amity Road Fund	40,000.00
Delinquent Tax Collections	39,000.00

It is then stated that all of these funds except the Amity road fund and the delinquent tax fund are the same funds before mentioned which should be in the county treasury, and that all of the monies in said funds had been certified to by the county auditor as being in the treasury and contracts had been made on the faith of such certifications except the Amity road fund and the delinquent tax fund. It is then stated that as to the Amity road fund there has also been a certificate of the auditor that the money is in the treasury, and that a contract has been made on the strength of such certification; that the fund of \$39,000 represents the collection of delinquent personal taxes. It is further averred that the resolution is illegal and void, and that there is no warrant in law for such transfers, and that there will not be money sufficient to reimburse such funds from the next collection of taxes. It is then stated that by a second resolution the county commissioners and auditor attempted to transfer the following sums from the funds named to the general county fund:

West Fifth Avenue	\$ 4,363.27
East Broad Street	6,881.24
North High Street	1,921.37
North Broadway	8,672.64
Fifteenth Avenue	8,870.75
Auditor's Fee Fund	15,718.36
Treasurer's Fee Fund	21,527.25
Sheriff's Fee Fund	2,515.00

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Recorder's Fee Fund	21,418.67
Clerk of Court's Fee Fund.....	4,981.69
Probate Judge's Fee Fund.....	11,013.84

It is then stated that the board of county commissioners and the auditor had a right to make transfers out of these funds to the general fund, but the exact amount of such funds which they had a right to transfer the relator is not informed, and that he has not the time to ascertain the amount before an irreparable injury will be done. It is then stated that by a third resolution the county commissioners and auditor have attempted to make transfers from the general county fund to certain other county funds, naming them, in a total amount of about \$150,000. This, it is stated, is illegal and void for the reason that there is no money in the general county fund, and that said general county fund is overdrawn to the extent of more than \$109,000. It is averred that there is no money in process of collection which can be applied to liquidate such transfers. The relator prays that the treasurer may be enjoined from misapplying such funds or any part of the same, and that the commissioners and the auditor shall be enjoined from transferring or attempting to transfer or taking any further steps towards transferring any of the funds mentioned.

The defendants have answered jointly and admit the overdrafts stated in the petition in the seventeen funds named, and that it amounts to \$22,741.44. They admit that the total amount of cash in the treasury and depositaries is correctly stated, except that the amount of cash in the treasury is \$23,455.38, being \$1,000 in excess of the amount stated in the petition. They admit that bonds have been sold and cash has come into the treasury in the amount stated in the petition, and that there was also in the treasury the amounts stated in the petition in certain other funds, making a total, as alleged in the petition, of money which should be in the treasury of \$515,063.75; and that owing to the fact that the levies made in 1910 and preceding years were insufficient to pay the expenses of the county, and owing to the fact that the Legislature had imposed an expense of about \$100,000 upon the county as the cost of the quadrennial appraisalment, there was not enough money in the treasury to pay all of said funds by the sum of about \$67,000, not taking into account the sum of about

\$41,000 in the treasury derived from delinquent tax collections. The defendants then state that there is now owing to the county and the county will receive for work already done and paid for by the county a total sum of \$73,361.57, and that there are no outstanding bonds or obligations against this amount, and that this amount will certainly come into the treasury; that there is also a large amount of money owing to the county for the improvement of certain streets, from which source about twenty-five thousand dollars was collected during the last year, but that the amount which will be realized during the present year can not be stated; and that there are no outstanding bonds or obligations against this. Furthermore that at the close of the year 1910, there was remaining unpaid taxes on real estate in a sum in excess of \$76,000, and a sum of \$158,926.26 remaining unpaid on personal property; that these are now in process of collection, and that when collected the county will receive its proportion of the same. The defendants admit the passage of the resolution in question, and deny the other averments of the petition. The defendants then state that there were in each of the funds mentioned in the second resolution above referred to the sums of money transferred, and in some of them more than the amount transferred; that in each case the funds represent the surplus of the net proceeds of a special tax or the proceeds of a loan for a special purpose, and that the sums transferred were not needed for the purpose for which the tax was levied or the loan made. As to the resolution first above mentioned the defendants say that the amount transferred from the several funds to the general fund will not be needed until after the period fixed by law for the first payment of taxes. They state that after these transfers to the general fund there was in that fund the sum of \$152,760.75 in excess of that which would be needed for the purposes of the fund until after the period fixed by law for the next payment of taxes, and that such funds to which the transfers were made were exhausted, and that the funds transferred to said exhausted funds were needed. The defendants state that they took this action to protect the credit of the county and to save the interest which would otherwise accrue on unpaid warrants. The defendants say they wish the matter to be determined by the court, and that it may be found that they have not misapplied any funds, and that the action against them may be dismissed.

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A reply was filed, but it is unnecessary that I should state the averments contained therein, as it raises no new issue material to the determination of the question submitted to the court.

It is apparent from the statements of the petition which are admitted by the answer that the county finances are in a somewhat embarrassing condition. The evidence does not disclose the cause of this, but it is said in the answer that it is due to the fact that there was not a sufficient tax levy made in the year 1910 and preceding years to meet the current expenses of the county, and that an extraordinary expenses was imposed upon the county in the year 1910 by reason of the quadrennial appraisement. This is not denied by the relator, except that in the reply it is stated that the quadrennial appraisement did not cost the county the sum of \$100,000. It is not material, however, to the determination of the question submitted to the court to trace the condition to its source, as, in the language of an eminent statesman, it is a condition and not a theory which confronts Franklin county at this time. The county funds are overdrawn to a large amount and there is not sufficient money now in the treasury to supply these funds, and this shortage will necessarily be very considerably increased before the taxes now in process of collection will be available, which will not be until about the first of March. To add to the embarrassment of the situation, the Legislature at its last session passed what is known as the Smith one per cent. tax law, which limits the levy of taxes to ten mills for all purposes, with a proviso that by a vote of the people this may be increased to fifteen mills. Furthermore the statute limits the gross amount of taxes which may be assessed in the year 1911 to the amount which was assessed in the year 1910, which it appears was largely insufficient to pay the expenses of that year. Furthermore Section 5649-3d, being a part of the Smith one per cent. law, provides that at the beginning of each fiscal half year the various boards mentioned in Section 5649-3a, which includes the county commissioners, shall make appropriations for each of the several objects for which money is to be provided from the monies known to be in the treasury from the collections of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not

set forth in the annual budget, nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances.

It is apparent from the evidence before the court that it will require rigid economy on the part of the county during the coming year to enable it to meet its current expenses from the tax levy made in 1911 and now in process of collection, and there will probably be no surplus, or at least not sufficient, after the payment of the expenses, to reimburse the depleted funds.

It is proper that I should say in this connection that there is no claim here that any of this shortage in the funds was not expended for the benefit of the tax-payers of Franklin county. A very large amount of money was spent the past year in the making of good roads, and far in excess of the expenditure for that purpose made in the past; and it is not denied that the making of the quadrennial appraisalment entailed a heavy expense on the county. It is simply a case, it seems, where the county did not levy and collect a sufficient amount of taxes to meet the expenses of the past year, and this was probably true for preceding years.

That some very troublesome questions will be presented as a result of this situation is apparent. It would be gratuitous, however, upon the part of the court to undertake to anticipate what these may be and how they should be met, except in so far as they are involved in the determination of the question presented here for decision. It never aids, but only leads to further embarrassment and confusion for a court to go beyond the decision of the question submitted. It is not the province of the court to give legal advice except in those cases provided by the statute which authorize certain fiduciaries to appeal to the court for advice in the discharge of their trust.

It is scarcely necessary that I should say that, of course, the county of Franklin will be compelled to pay its legal obligations, and neither the Smith law nor any other law can be permitted to require the county to repudiate its legal obligations. It is to be hoped, however, that this law, which is one enacted for the protection of the tax-payers against the extravagant expenditures of public funds, can be so construed, together with the other laws, as to enable the county to meet all its legal obligations. But as I view the question here submitted, it is not to be disposed of by a

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consideration of the difficulties which will confront the county in the future. "Sufficient unto the day is the evil thereof."

The question here submitted for decision is: Does the law, as it stands, authorize the defendant board of commissioners and auditor to make the transfer of the funds covered by these resolutions to other funds which are exhausted, to meet the present needs? The question here presented is one which, as I view it, must be determined by a construction of the various statutes on the subject of the transfer of funds; and in construing the laws relating to the powers of the county officers the rule upon the subject of their powers must be kept constantly in view. Corporations, whether strictly such or only *quasi* corporations, are limited in the exercise of powers to those specifically conferred upon them by law, and those necessarily incident to the exercise of the powers granted. 7 O., part 1, p. 232.

Judge Brinkerhoff says in *Commissioners v. Mighels*, 7 O. S., 116:

"Neither a county nor the board of commissioners of a county is a corporation proper; it is at most but a local organization which, for purposes of civil administration, is invested with a few functions characteristic of corporate existence. But it is an established rule, that a grant of powers to a corporation proper shall be strictly construed, and it seems to us that this rule is at least equally applicable in any inquiry into the powers and capacities of a *quasi* corporation, whose powers and functions are, from their very nature and object, more strictly limited than those of a corporation proper."

This doctrine is so clearly established that no one has seen fit to question it since that time. I come, therefore, to a consideration of the statutes on the subject of the right and power of the commissioners and auditor to take the action which the answer admits they have taken. In the determination of this question it is necessary to construe several sections of the statutes which relate to the subject of the transfer of county funds from one fund to another.

Section 5699 of the General Code provides:

"The county auditor shall carefully ascertain the net amount of taxes collected for each particular purpose. A specific fund shall not be used for any other purpose than that for which it was levied until such purpose has been satisfied."

This statute has been long on the statute books. It will be found in the 56 O. L., at page 175, Section 5, and was passed in 1859. It is the claim of the prosecutor that this section forbids the transfer of these funds.

Section 2443 of the General Code provides:

"The county commissioners may transfer an unexpended balance of any fund, raised for the purpose of erecting public buildings, remaining in the treasury, to any other fund, or to any other purpose for which money is needed by the county. If there is a fund in such treasury that has been levied and collected for a special purpose, and such fund, or a part thereof, will not be needed for such purpose until after the period fixed by law for the next payment of taxes, and any of the other funds of the county are exhausted, the commissioners may transfer such special fund, or such part thereof as is needed to such exhausted fund, and reimburse such special fund from the taxes levied for such other fund, as soon as they are collected."

This act will be found in 66 O. L., 52, Section 16, passed in 1869, ten years later than the other statute. This act being passed subsequent to Section 5699 of the General Code necessarily modifies that section to the extent therein provided.

Section 5654 provides:

"When there is in the treasury of any city, village, county, township, or school district, a surplus of the proceeds of a special tax, or of the proceeds of a loan for a special purpose, which is not needed for the purpose for which the tax was levied or the loan made, it may be transferred to the general fund by an order of the proper authorities entered on their minutes."

This act will be found in the 75 O. L., at page 132, passed in 1878.

Section 2296 of the General Code provides:

"The county commissioners, infirmity directors of a county or municipality, township trustees, the board of education of a school district or the council or other board having the legislative power of a municipality, may transfer public funds under the supervision, from one fund to another, or to a new fund created under their respective supervision, in the manner hereinafter provided, which shall be in addition to all other procedures now provided by law."

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This act will be found in 95 O. L., 371, Sections 1 and 2, and was passed in 1902. This section and the following sections of the General Code, to and including Section 2302, provide briefly that where the county commissioners by resolution declare there is a necessity for a transfer of funds from one fund to another, a petition shall be filed in the court of common pleas. These sections provide for the procedure in this court upon the filing of such petition, and that the court, if it finds there are good reasons for making the transfer, may so order.

This statute relating to transfers upon the order of the court of common pleas was passed subsequent to the others, and provides a more elastic scheme of transfers than had been before provided, and vests a large discretion in the court in the ordering of such transfers. This discretion thus vested in the court, it is apparent from the reading of the several statutes, was not vested in the county commissioners and the auditor, but their powers in that regard are strictly limited to the cases provided by the statute, and the grant is to be strictly construed.

It is the claim of the prosecuting attorney, as I understand him, that such transfers can only be made upon an order of the common pleas court. It is his claim that the language of Section 5654, "may be transferred to the general fund by an order of the proper authorities entered on their minutes," has reference to the court of common pleas; but this Section 5654 was enacted long prior to Section 2296, and at a time when the court was clothed with no jurisdiction over the subject of the transfer of funds. Furthermore, Section 5654, as originally enacted, provided that "the authorities having in charge the disbursement of such funds are hereby authorized and required to cause such funds to be transferred by resolution duly entered upon the record of their respective boards, to the general revenue fund." This act was amended in 1896, and the phraseology slightly changed; that is, the language, "entered upon the records of their respective boards," was changed to, "an order of the proper authorities entered on their minutes." This change in phraseology clearly did not change the meaning of the statute, and the reference to the proper authorities is to the county commissioners, and the order to be entered is to be entered on their minutes.

The resolution of the commissioners which transferred the balance of the funds remaining from the West Fifth avenue improvement fund and the East Broad street improvement and North High street improvement and North Broadway improvement and the Fifteenth avenue improvement is, as to these funds, clearly authorized by the provisions of Section 5654. As to the remaining funds covered by that resolution, their action is clearly authorized by the provisions of Section 2985 of the General Code, which authorizes the transfer of the fee funds by the county officers to the general fund. I find, therefore, that as to this resolution, the action of the county officers in making the transfer was in accordance with law.

Coming then to a consideration of the action of the commissioners in undertaking to transfer the funds covered by the other resolution, I find that it covers funds realized from the sale of bonds, from delinquent tax payments, from the election fund, floating debt fund, depository interest fund, and undivided taxes.

First, as to the right and power of the commissioners to transfer undivided taxes to exhausted funds: This authority, if it exists, can not of course be found in Section 5654, which only authorizes the transfer of unexpended balances. It is claimed the authority is found in Section 2443, which authorizes a temporary transfer of funds to exhausted funds. This act was passed, as I have stated, in 1869.

Section 2571 of the General Code was passed in 1904, and provides:

“When any fund is exhausted, the county auditor and treasurer shall make an estimate of the amount of money belonging to such fund which has been collected as taxes and credited to the undivided tax funds in the treasury. If the commissioners deem it advisable by an order entered on their journal, they may authorize the auditor and treasurer to transfer from such undivided tax funds to the fund so exhausted an amount not to exceed three-fourths of the amount so estimated to belong to the exhausted fund. At the next semi-annual distribution of taxes the amount so transferred shall be deducted from the total amount found to be due such fund.”

Even if it should be conceded that Section 2443 authorized a temporary transfer of the whole amount of these undivided taxes,

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this act passed subsequent to Section 2443 must of necessity repeal by implication Section 2443 as to undivided taxes. For, this being the last expression of the legislative will covering the subject of the temporary transfer of undivided taxes, limits the power of the commissioners to a transfer temporarily of only three-fourths of the amount estimated to belong to the exhausted fund. But, as I construe Section 2443, it can not be made to cover these funds. Section 2443 authorizes the transfer of funds levied and collected for a special purpose, while these undivided taxes are not such a fund. I conclude, therefore, that by no construction, either liberal or strict, has the Legislature authorized the transfer of these undivided taxes in bulk, and that the attempt to do so by the commissioners was unauthorized and void, because beyond their power.

Coming next to the proceeds of bond sales: Does Section 2443 authorize the transfer of these funds? This section first provides that the county commissioners may transfer the unexpended balance of any fund raised for the purpose of erecting public buildings in the treasury to any other fund or to any other purpose for which money is needed by the county. I call particular attention to the language of this first grant of power. It authorizes the transfer of any fund raised for the purpose of erecting public buildings. This word "raised" is broad enough to include money derived either from taxation or from a loan. It was doubtless intended to refer to the transfer of a balance of the proceeds of a loan, or as it would ordinarily be, the balance of the proceeds of a bond sale, which would remain unexpended in the treasury; but when we come to the next grant of power in the same section immediately following it, of the statute, we find the language to be very different. The grant here is to transfer a fund that has been levied and collected. This manifestly relates to a fund resulting from the levy and collection of taxes, and not to the proceeds of a bond sale or a loan. If the Legislature had intended to make the same grant of power to the county commissioners in this second provision for transfer as in the first, naturally the same language would have been used; that is, a fund raised for a special purpose. When we turn to the language of Section 5654 we find the Legislature clearly making the distinction between a fund raised by the sale of bonds or a loan,

and a fund produced by a tax levy. The language of Section 5654 is, "When there is in the treasury of any city, village, county, township or school district, a surplus of the proceeds of a special tax or of the proceeds of a loan for a special purpose, which is not needed," etc., "it may be transferred." It seems to me that even by a liberal construction of the provision of Section 2443, it can not be made to cover the transfer of the proceeds of bond sales. But, as I have already pointed out, when we are called upon to construe a statute which confers power upon a board of county commissioners, the grant is to be strictly construed against the board, and so construing it I see no escape from the conclusion that the statute does not authorize the commissioners to transfer such funds to other funds.

It has been argued that this is wise business policy, but of course that argument can not be given any weight in face of the rules of law applicable to the construction of such grants of power; and I further call attention to the fact that the Legislature, when in 1902 it added to the law upon this subject of transfer of funds a provision for an action by the commissioners in this court, had manifestly reached the conclusion that cases might arise where it would be good business policy to make transfers in the county funds which were not authorized by the laws then in force, and to meet these they added the provision for such an action to obtain the authority from the court, and clothed the court with a broad discretion in the matter. But this will not authorize the court to say that the commissioners may exercise this discretion. To do so would be judicial legislation.

Nor can duplicate tax payments be said to be a fund levied and collected for a special purpose.

Neither is the so-called floating debt fund nor the depository interest fund a fund levied and collected for a special purpose.

As to the election fund, this is, as I understand it, a fund levied and collected, but I am of opinion it is not within the meaning of the law a special fund, as it is, as I understand it, one of the regular funds of the county, for which taxes must be regularly levied and collected and appropriated.

I conclude, therefore, that this resolution undertakes to transfer funds which the commissioners are not empowered by law to

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transfer, and that for that reason their action in attempting to do so was void, and that the funds thus attempted to be transferred should be restored to the funds to which they belong.

This disposes, of course, of the third resolution, for if the commissioners had no authority to make a transfer from the funds covered by this resolution, there is no money in the general fund to be transferred to the other fund.

CONSTRUCTION OF THE STATUTES RELATING TO SODOMY.

Common Pleas Court of Washington County.

STATE OF OHIO V. DOUGLAS PRICE.*

Decided, 1911.

Criminal Law—Meaning of the Phrase "Any Opening of the Body" as Used in Section 7020-1, Revised Statutes (General Code, 1904S).

The head is a part of the human body and the mouth is an "opening of the body" within the meaning of the statute relating to sodomy.

JONES, J.

On demurrer to indictment.

The indictment in this case charges what our criminal code calls "Sodomy." The act is charged to have been in the mouth of the suffrant. Omitting the formal parts of the indictment:

"do find and present that one Douglas Price, late of the said county of Washington, on the 23d day of August, 1910, at the county of Washington aforesaid, did unlawfully, willfully and maliciously have carnal copulation against nature, with a certain male person, to-wit, with one John Sersain, in an opening of the body of the said John Sersain other than the sexual parts, to-wit, in the mouth of the said John Sersain, he the said John Sersain then and there being a human being other than

* Following the overruling of the demurrer in this case the defendant entered a plea of "not guilty," and on trial was found guilty under a charge which instructed the jury that carnal copulation by the mouth was an offense within the statute. The case was taken to the circuit court and there affirmed without report, and upon application to the Supreme Court for leave to file a petition in error leave was refused.

said Douglas Price, and that said Douglas Price then and there unlawfully committed the crime of sodomy as aforesaid, contrary to the statute," etc.

To this indictment a demurrer is filed, and the contention of counsel for the accused is that the mouth is not "any opening of the body" within the meaning of the statute covering sodomy; that the head is not a part of "the body," and that the term "body" means only the trunk as distinguished from the head and limbs.

In support of this claim the definition of the word "Body" as given in the American & English Enc. is cited. The definition there given is as follows: "Body.—The main part or frame of anything in distinction from the subordinate or less important; as of man in opposition to his head and limbs, or of places."

Up to May 4, 1885, there was no statute of this state defining sodomy, or making it a crime. On that date a law was enacted that read as follows:

"Whoever shall have carnal copulation against nature, with another human being or with a beast, shall be deemed guilty of sodomy, and shall, on conviction thereof, be imprisoned in the penitentiary not more than twenty years." 82 O. L., 241.

But this statute was later deemed insufficient by the law-makers of the state, possibly because the terms "copulation against nature" was too indefinite and uncertain, when coupled with the term "sodomy," which undoubtedly originally meant copulation *per anum* only. But there has gradually been an extension of the meaning of the term until it now generally includes "bestiality," intercourse with a beast, whether in the sexual part or otherwise, and also to include all carnal intercourse with a human being except in and by the sexual parts. And the term "crime against nature" and "copulation against nature" have come to have a very broad meaning.

At any rate the law was changed in 1889 so that it now reads as follows:

"Whoever shall have carnal copulation in any opening of the body, except the sexual parts, with another human being, or with a beast, shall be deemed guilty of sodomy." * * *

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This wording seems to me little improvement on that of the act of 1885, for it leaves room for a contention that copulation with a beast in the sexual part would not be within the terms of the law.

Indeed that very question has been raised, and, by at least one circuit court held to be well made. True, the comma after the word "being" may have been intended to limit the term "except the sexual parts" to intercourse "with another human being" and so make any form of intercourse with a beast "sodomy." But a criminal statute must be strictly construed and can be little aided by intention of the Legislature. Why did not the framer say: "Whoever shall have carnal copulation in any manner with a beast, or shall have carnal copulation with any other human being except by the sexual parts, shall be punished by imprisonment," etc.

This is a digression from the question made in this case, however, but may be excused in view of the loose and insufficient wording of so many of our statutes, even in criminal matters.

As I have already said, the claim of counsel for the accused is that under the definition of the word "body" given in the Encyclopedia of Law, the head is not a part of the body, and consequently the mouth is not "any opening in the body," and that, as the indictment here shows that the copulation was in the mouth, the indictment shows on its face that no crime was committed under the wording of the statute.

This claim is not supported by the authorities, and even resting on the definition on which the defense relies one would have to take a very narrow and artificial view of it to so hold.

The Standard Dictionary defines "body" as "the entire physical part of a man or other animal; the material or physical organism, as distinguished from the soul; as a dead body."

The medical definition of the term "body" is: "the material part of man as distinguished from the mind or spirit." Foster's Enc. Medical Dictionary.

The statute under which this indictment is drawn has never, so far as I have been able to learn, been construed by any Ohio court. Several of the states, under statutes making it a crime to have intercourse "against the order of nature," have held that carnal copulation by the mouth was a crime. They refuse

to hold that copulation *per anum* is the only act included in the "crime against nature." But those states do not use the same verbiage as ours.

Most of the states go no further in their designation of the act than to call it "a crime against nature," and say "Whoever shall commit a crime against nature with any other human being or with a beast shall be deemed guilty of sodomy," etc.

Such statutes have been held to include carnal copulation in the mouth, as well as *per anum*, and in any form with a beast.

However, the term "crime against nature" seems very indefinite, and except by force of usage would mean nothing and define nothing, for murder is a crime against nature, and so is rape. But usage has given to it the very common meaning of all unnatural forms of carnal copulation. Our statute seeks to be more definite and certain, and to define with particularity the crime against which it is aimed.

In Iowa a statute almost identical with our own was construed. That statute is as follows: "Whoever shall have carnal copulation in any opening of the body except the sexual parts, with any other human being, or shall have carnal copulation with a beast, shall be deemed guilty of sodomy." It will be seen that this is in the exact wording of our present statute so far as the words "any opening of the body except the sexual parts" is concerned. This statute was construed in the case of *State v. Gage*, 116 N. W., 596, and was held to include the mouth as an "opening of the body."

This seems a fair and reasonable construction of the law.

"The rule of strict construction of penal statutes does not require the courts to go to the extent of defeating the purpose of the statute by a severe and technical application of the rule." *Conrad v. State of Ohio*, 75 O. S., 52.

But, to hold that the term "body" in this statute does not include the head, and that consequently carnal copulation by the mouth was no crime within the statute, would be to give the term "body" a "severe and technical application," and one very forced and artificial.

The demurrer to the indictment will therefore be overruled.

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**CONSTRUCTION OF CONTRACT FOR SERVICES OF
ATTORNEY.**

Superior Court of Cincinnati.

**TRUSTEES OF THE SOUTHERN RAILWAY V. WASHINGTON T.
PORTER.**

Decided, January 12, 1912.

Attorney and Client—Employment of Counsel at a Fixed Compensation—Duties Largely Increased by Subsequent Legislation—But Employment Held to Have Been Under an Express Contract, and Additional Services Not Excepted Therefrom.

Under a resolution adopted by a board of trustees providing "that W. T. P. be and he is hereby appointed attorney for the board at a compensation of \$50 per month, subject to the will and pleasure of the board both as to term of service and rate of compensation," the employment was under an express contract from month to month, and the fact that as a result of subsequent legislation the duties of the attorney were rendered much more arduous would not entitle him to additional compensation, as on *quantum meruit*, but the board had the right under the express agreement to allow additional compensation either before or after the work was done.

John W. Peck, for plaintiffs.

Rufus B. Smith, contra.

HOFFHEIMER, J.

This action grows out of a claim against the plaintiffs for \$25,000 as attorney fees, for services rendered by Mr. Porter in certain appropriation proceedings, and matters collateral thereto, and which proceedings were instituted by plaintiffs, under the legislation of 1898, which authorized an expenditure of \$2,500,000 for terminals.

Various payments amounting to \$7,100 have been made to Mr. Porter on account; \$1,100 is credited for the monthly installments (\$50 per month) of 1903 and 1904. \$1,000 being by cash October 4, 1904, and \$5,000 being by way of cash May 7, 1908. There would still be due Mr. Porter, under the action of the board of trustees in allowing him "additional compensa-

tion," the further sum of \$1,050 if the contention of the board of trustees is correct.

On the other hand, if defendant prevails, he would be entitled to \$17,900 according to his claim, or whatever would be found to be the reasonable value of the services rendered.

It is admitted that services were rendered by Mr. Porter, although the extent and value of same is denied. The principal controversy is, whether Mr. Porter's remuneration is dependent on express contract, as the plaintiffs allege, or whether there was an implied agreement to pay the reasonable value of such services, as defendant claims.

A consideration of the questions presented involves the resolution of the board of trustees of April 7, 1894, as follows:

"Ordered that W. T. Porter be and he is hereby appointed attorney for the board at a compensation of \$50 per month subject to the will and pleasure of the board both as to term of service and rate of compensation."

Mr. Porter became attorney for the board under and by virtue of such resolution, and was acting in such capacity during the period for which the services herein involved were rendered.

Mr. Porter contends, at the time such resolution was passed in 1894, the sole duty of the board was to see that the terms of the lease were being observed, and that he was simply employed to advise the board, in regard to legal questions that would occasionally arise in such matters, and that this employment was understood by both parties to relate exclusively to work to be done under laws relating to said trust and in existence when such resolution was passed; that at said time the board had no funds to enter upon appropriation proceedings for terminals and such work was not in contemplation; that such work was only rendered possible by legislation passed four years later, or in 1898, and that when he entered upon such work, it was the intention to pay him the reasonable value of his services.

The plaintiffs, as I have said, contend that the services in question were rendered by Porter as "attorney for the board" under his special agreement, and that he received therefor the stipulated compensation, \$50 per month, and that the resolu-

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tions subsequently passed by the board, were passed under its right to grant additional compensation.

Such being in substance the contention of the parties, it is at once apparent that a proper construction of the resolution of 1894 or its effect becomes of vital importance.

What then was the nature of Porter's employment under the resolution, and what services did his contract of employment include?

In my opinion, under the resolution set out, the contract was one by which Porter agreed to render whatever legal services were required by the board, within the time the contract was in force. It was a month to month contract, and gave the board the right to grant additional compensation for work done, or to be done, when it saw fit so to do.

It has been argued that while the board may have had the right to raise the stipulated amount, they could not do so, unless the increase was made before work done, and it is argued that such contract therefore, could not have been understood as applying to such work as was done herein and that no such increase was made before work done.

If the additional compensation was to be allowed before work done (and it is conceded that the contract certainly gave such right), it is rather strange, if the express contract was so understood, that defendant, an able attorney, did not see to it, that such increase was made, prior to engaging in the appropriation proceedings.

It would hardly be an answer to say, that this was not done, because defendant was not relying on such contract, or believed same had no application, or that the parties agreed or understood that such services were to be on implied contract, for by actually crediting on his bill of December, 1904, the monthly payments for 1903 and 1904, provided under the express contract, Mr. Porter, himself, expressly negatives such claim. Particularly in view of the burden on defendant by reason of the relation of attorney and client and as we shall later see.

Again, if it be conceded that the understanding was that the board had the right to raise the \$50 salary before work done, it would be evident that the parties contemplated that more ard-

uous duties might be involved than such as defendant claims were within contemplation and as are set out on page 20 of defendant's answer, thus again sustaining plaintiff's view as well as that of the court. If the parties had in contemplation more arduous duties than those alluded to, there would exist good legal reason for the incorporation of a provision of this character, whereby the board was given the right to increase the compensation either before or after work done. It would be difficult to believe that the purpose of the provision was to enable the board to reduce at any time the already small \$50 monthly stipend. Would it not be more reasonable to suppose that the parties contemplated and understood that more arduous duties might be necessary and which in justice would be entitled to more than \$50 per month, and that if such services were begun in the middle of the month or were rendered at any time, that the board of trustees would pay for them afterwards, and on such basis as they might think fair and proper? If such was the case, then the provision as to increased compensation and which otherwise would be practically unnecessary (unless it was meant to protect the board if it so desired, from paying as much as \$50 for any one month), becomes significant and vital and is for the protection of both parties, for without such express reservation of such right (rate of compensation) such increased services as would be rendered by Porter as attorney for the board and as above referred to, could never thereafter be paid for. For after such services were once rendered within the line of his duty as "attorney for the board" the trustees having theretofore expressly agreed to pay \$50 per month therefor, could not increase the pay and thus donate the trust funds to Porter, nor could any alleged "extra" services so rendered be the basis of implied agreement thereafter, inasmuch as they would be deemed to have been gratuitous. *N. Y. & N. H. R. R. v. Ketchum*, 27 Conn., 170.

If, then, we are thus far correct in our interpretation and construction of the contract, the next question would be, as to the scope of the contract, and whether it included by its terms the services rendered by Mr. Porter.

If the contract was a monthly contract, and Mr. Porter renewed his contract, let us say, in May, 1898, since the legislation

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necessitating the appropriation proceedings was passed April 23, 1898 (93 O. L., 637), we would read this law into the contract, in order to determine the scope, and effect of the contract, and the rights, obligations and duties of the parties thereunder.

Under such circumstances surely the services in regard to the appropriation proceedings were legal services such as the board would have the right to call upon its "attorney for the board" to perform, just as it actually did direct him in such capacity to proceed. (Res. Jan. 24, 1903.)

Nor do I believe that the renewal of the contract from month to month would exclude the law of 1898, as argued by defendant, and so confine the renewed contract to such laws only as may have been in existence when the original contract was entered into. The parties, it seems to me, must be presumed to have known at the time of the original contract that the state laws governing the board were subject to change, and if they renewed the contract they must be presumed to have renewed subject to such change, particularly where the change was known to the parties at the time the contract was renewed. *Moore v. Harter*, 67 O. S., 250. See, also, effect of subsequent legislation, *Martin v. Veeder*, 20 Wisc., 446.

But whether this was a monthly contract and was so renewed down to and through the period during which this work was done, and so as to include the duties rendered necessary by the act of 1898, would after all seem immaterial. For, inasmuch as the contract of 1894 was admittedly in existence in 1903 and 1904 (see pleadings and the recognition thereof in Mr. Porter's bill Dec., 1904), and if we are to be governed by the obligations of the contract as of the date when same was originally made, it would seem to me that the services rendered were still within the scope of such contract.

At the time the 1894 resolution was passed, the power of eminent domain was in the board, and this was a continuing power, whether it had funds to carry it out or not (*Trustees v. Handy*, 9 W. L. B., 32). But whether we speak of it as a power or as a mere naked right (owing to exhaustion of funds) such power or right was likely to be called into action, precisely as happened here, and as was the case on a number of instances after the

original act of 1869 and prior to the passage of said resolution, all within the knowledge of all parties. And therefore it would seem to me, that any legal duties that would devolve on the attorney in his capacity as attorney for the board, by reason of subsequent legislation or otherwise, and in respect to such existing power or right of the board, in reference to eminent domain, would be within the general performance, the attorney or contractor promised. Since Mr. Porter expressly agreed to act and work as "attorney for the board," the fair construction of the contract would be "that he would do whatever his employers would have occasion to employ an attorney about," and with respect to the business of the board.

See language of Black, J., in speaking of the employment of a "secretary," in *Carr v. Charters Coal Co.*, 25 Pa. St., 337.

Such "increased" services, if they can be so called, as might thus be rendered necessary, being incidental to the powers and duties existing in the board, could not, therefore, be said to be different from those he expressly agreed to render. Nor, in view of such vested power or vested naked right, could they be said to be "unreasonable" (*Vorheis v. Combs*, 33 N. J. L., 494; *Koplets v. Powell*, 56 Wisc., 671; *Pew v. Gloucester Bank*, 130 Mass., 391; *Hodges v. Ry. Co.*, 29 Vt., 220). At best it could only be said his duties were rendered more burdensome, by subsequent legislation.

Subsequent legislation which does not render the performance promised impossible, but simply makes performance more burdensome, does not excuse performance by the contractor under the anterior contract (*Wait's Engineering & Architectural Jurisprudence*, 678; *Martin v. Veeder*, 20 Wisc., 446; *David v. Ryan*, 47 Ia., 642; *Baker v. Johnson*, 42 N. Y., 126). And it certainly could not excuse it here, if the performance promised by the contractor was as I have already stated, fairly within the general performance expressly promised.

It may be that *Judah v. Vincennes Univ.*, 16 Ind., 56, and *Calvert, Executrix, v. Coxe*, 1 Gill (Md.), 95, cited by defendant, are to the contrary. But if the court is correct in holding that these particular services are within the general performance promised, then under the facts in the Judah case and the Calvert case, same would not be opposed to what has been said.

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The subsequent legislation here, did not require a totally different performance from that expressly promised, nor did it render that performance impossible. It simply, at most, increased his labors with reference to a general performance promised and with reference to whatever legal work might be required in his capacity as "attorney for the board."

If the contract was doubtful or ambiguous, the practical construction given by the parties would tend to confirm the view I have felt compelled to take of this contract. This same act of 1898, it seems, required Mr. Porter to attend to certain legal duties including appearance in court and services quite different from those specified on page 20 of the answer. The board refused to grant additional compensation for same, nor was such compensation insisted upon by Mr. Porter. How can we distinguish the particular services herein rendered from the others since all were rendered necessary by the act of 1898?

Moreover, the contract of 1894 which required Mr. Porter to act as "attorney for the board" was without limitation and it would seem to me, that it could only be properly held that the parties used the phrase as intending to cover all legal work, ordinarily and usually to be expected of an attorney, whether advisory or in litigation.

I have just pointed out, that such at least was the board's construction when claim for extras was made by Mr. Porter on a previous occasion and was probably the construction finally put on it by Mr. Porter for he acquiesced in the action of the board.

Indeed, under a substantially similar contract, under which Mr. Porter served as "attorney for the board" from 1873 down to 1887, performing whatever services were required by a number of new acts of the Legislature, including condemnation proceedings under Act of April 9, 1880, involving an expenditure of \$300,000 there was the same practical construction by the parties.

It would thus appear that heretofore the parties by their own practical construction have considered similar work as within the duties of the attorney for the board.

How then can we make it appear, that the services rendered by Mr. Porter in these appropriation proceedings were an exception to the legal work he expressly engaged to perform?

Since it is admitted by the pleadings, and the evidence, particularly the bill of 1904, that the contract entered into by Mr. Porter, under the resolution of 1894, whatever its character, was in existence during the time when these services were rendered, the burden would certainly be upon the attorney to prove that these services were excepted from the express contract. In other words that there was an implied agreement to pay the reasonable value of such services.

Not only that but by virtue of the relation the court requires clear and convincing evidence or strict proof. *Meyers v. Pearce*, 3 C.C.(N.S.), 182.

The quantum of proof thus required, to show that the parties understood that such services were "extra" or beyond the express contract, or that they were being accepted as such during the time of their rendition is in my judgment lacking. Indeed I would be unable to set out very little evidence, if any, tending to show mutuality, which is as necessary in implied as in express agreement (*Railroad v. Gaffney*, 65 O. S., 104), unless it were to be found in the resolutions of February 6, 1904, or January 30, 1905. These resolutions in and of themselves can not be the basis of implied agreement in view of the express contract, nor can I say that they tend to prove or would be in themselves sufficient proof, that the parties had theretofore agreed or understood that the services rendered in the appropriation proceedings were to be paid for as "extra."

Certainly the mere fact that the board in 1904 resolved to change Mr. Porter's contract or even specified out of what funds he was to be paid, can not be said to evidence some understanding that services rendered prior thereto, were not rendered under the special agreement.

Aside from my inability to set out what would measure up to the quantum of proof necessary under *Meyers v. Pearce*, *supra*, to sustain *quantum meruit*, in view of the admitted existence of the special contract, I would find myself further embarrassed in an endeavor to reach such conclusion by the act of Mr. Porter himself in recognizing (as evidenced by his bill of December, 1904), that the express contract in some way governed these services, for surely an implied agreement can not co-exist with an express

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contract, both embracing the identical subject. *Vorheis v. Combs*, 33 N. J. L., 494, Syl. 2.

In view of the foregoing I am of opinion that recovery must be limited to the special contract. I have reached this conclusion not without some reluctance because in my opinion the amount finally awarded by the board is in my judgment none too liberal, considering the nature of the work done, the amount of it, the amount of money involved, the time actually consumed, the skill and ability required and displayed, and the responsibility particularly in the matters involving examination and report on the certificates of title, and considering also amounts actually saved by Mr. Porter's negotiations out of court, as well as by actual trial work, even conceding that in many matters he had the assistance and co-operation of others.

In the estimate of the high value of the services rendered, the court's opinion of them is reinforced by the opinion of several attorneys of excellent repute and experience, who testified in the case. The court, however, irrespective of what its opinion may be on the amount allowed, can not now make a different contract for the parties, but since it believes the services were within the express agreement, it has no power other than to say that the contract the parties saw fit to make, must control.

In the absence of bad faith, and certainly nothing of that character is charged, the trustees, even though they may have awarded less than what would appear to have been the reasonable value of such services, had ample power to fix the amount to be paid at whatever they saw fit, since that was left to them under the contract. *B. & O. v. Stankart*, 56 O. S., 224; 232; *Meacham on Agency*, 654; *United States v. Robeson*, 9 Peters, 319; *Howe v. Kenyon*, 4 Wash., 677.

In view of the foregoing, it is the judgment of the court that defendant is entitled to no other or greater compensation than that fixed by the board of trustees, and a decree may be taken as prayed for in accordance herewith.

SECURITY FOR COSTS ON APPEAL.

Court of Common Pleas of Hamilton County.

CHARLES BERGER V. OSCAR GOLDSMITH ET AL.

Decided, December 20, 1911.

Appeal—Security for Costs—Requirements as to, Apply to Appealed as Well as Original Cases—Sections 11614 to 11620.

A non-resident plaintiff, in an appeal from a justice of the peace to the common pleas court, may be required to give security for costs, notwithstanding the judgment below was in his favor.

Herbert Jackson, for motion.

L. H. Pummill, contra.

GORMAN, J.

Decision on motion for security for costs.

This cause is here on appeal from a judgment of a justice of the peace. The judgment below was in favor of plaintiff for a sum of money and for costs. The defendants appealed and perfected their appeal by giving bond as required by law, and to the approval and satisfaction of the justice of the peace.

A motion is now interposed by defendants to require plaintiff to give security for costs, on the grounds that the plaintiff is a non-resident of this county and state. This fact is admitted by the plaintiff's counsel. No motion of this character was made in the justice's court.

It is contended by plaintiff's counsel that inasmuch as the defendants have appealed and brought the cause and the plaintiff into this court, this motion ought not to be granted and that the statutory provisions with reference to requiring security for costs (Sections 11614 to 11620, General Code, inclusive) apply only to causes originally commenced in the court of common pleas.

Section 11614, General Code, makes no exception as to appeal cases, but the provisions thereof seem to be general and applicable to all causes of action in the court of common pleas. The surety is bound for the payment of all costs which may be

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adjudged against the plaintiff in the court in which the action is brought, or in any other court to which it may be carried.

The provisions of Sections 10483 and 10484, General Code, for security for costs in justice's courts, apply only where the plaintiff is a non-resident of the township in which the action is brought, and do not reach a case where the plaintiff is brought into the common pleas court on appeal. The object of the statutes with reference to requiring security for costs is to place the defendant in a position where he may recover his costs on execution in case the final judgment may be in his favor; and therefore it is required that the surety must be a resident of the county (Section 11614, General Code).

The court is of the opinion that this case falls within the rules laid down in the case of *Hull v. Burson*, 61 O. S., 283. In that case it was held that a surety on an undertaking for costs in a justice's court under Section 6701, Revised Statutes (Section 10483, General Code), is liable only for the costs made in that court, and not for costs made in the action in the court of common pleas on appeal.

On pages 285 and 286 Judge Spear in deciding the case uses this language:

"Now the subject-matter in question is the securing by the plaintiff of costs accruing in the court of common pleas. Referring to the section dealing with the securing of costs in that court (5340, R. S.; 11614, General Code), we find it provided that the plaintiff, if a non-resident of the county, must furnish security for costs. As to a plaintiff resident of the county, no such requirement is made. *This applies as well to actions which may be appealed into that court as to those which are originally commenced there*, and it is common practice for that court, in appeal cases as well as others, to require the plaintiff, if a non-resident of the county, to furnish security for costs."

In the case at bar the plaintiff is not only a non-resident of this county, but of the state; and it does not follow that he will recover a judgment in the common pleas court merely because judgment was rendered in his favor before the justice; and in case judgment should be rendered in this court in favor of defendants, how are they to make their costs out of a non-resident of this state and county?

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There appears to be no more reason for requiring a non-resident of the county, in a case originally brought in the court of common pleas, to give security for the costs, than in a case on appeal. Both the statute and reason apply in the one case as well as in the other.

This view of the matter is further sustained in the cases of: *Stewart v. Smith*, 73 O. S., 62; *In re the Will of Robert Barr*, 30 Bull., 386.

The motion to require plaintiff to give security for costs will, for the reasons stated, be granted.

ASSESSMENTS BY THE FRONT FOOT.

Common Pleas Court of Summit County.

WILLIAM T. HENRY V. CITY OF BARBERTON.

Decided, January 19, 1912.

Assessments for Improvement of Streets—Construction of 101 O. L., 134—Respecting the Third Method of Computing Special Assessments—Rule of the Haviland Case Again Prevails.

1. When a statute, which has received a settled judicial construction, is repealed and is afterward re-enacted in the same terms and for the same purpose and object, it will be presumed that the legislative body, so re-enacting it, intended that it should bear the same construction which had been given to the original, unless a different intention is shown.
2. The term "foot front" in Section 2264 of the Revised Statutes, having been construed by the courts as meaning, for assessment for the improvement of a street, a frontage equal to the linear measurement of the most prominent and conspicuous side of a property, rather than the side actually abutting on the street on which the improvement is made; and the courts, upon the repeal of this section (96 O. L., 39, Sec. 50) and the substitution of another act providing for an assessment by the "foot frontage" having construed that substitution as an intention of the General Assembly to abrogate the former construction by the courts of the meaning of the term "foot front"; when the latter act was repealed and in the repealing act an assessment was provided for by the "foot front" in language identical with old Section 2264 (101 O. L., 134), the presumption arises that, by so doing, the General Assembly intended the assessment so provided for by the "foot front" should

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mean the same that it had theretofore been construed to mean by the courts.

3. The act of April 22, 1910 (101 O. L., 134), amending Section 3812 of the General Code, requires the third method of assessing property for improvements to be made by the "foot front," meaning thereby that if a lot abuts lengthwise on the improvement, but fronts breadthwise on another street and not on the improvement, the lot should be deemed as fronting breadthwise on the improvement and be assessed for the number of feet on the improvement that it would have in such case, and no more.

S. A. Decker and C. F. Beery, for plaintiff.

Elmer Boden, City Solicitor, contra.

DOYLE, J.

The city of Barberton, since the amendment of April 25, 1910 (101 O. L., 134) of Section 3812, General Code, levied assessments upon the lots of the plaintiff and of the plaintiffs in the other cases submitted to the court with this case, whereby it sought to charge by the "foot frontage" of the property bounding and abutting upon the improvement.

The plaintiffs own corner lots which front on other streets than the one on which the improvement was made for which they are assessed, and they have been charged upon each linear foot of those sides of their lots which abut upon the improved street.

The property owners claim that they are only properly chargeable on the number of feet of the sides of their respective lots which abut upon the streets toward which the lots front.

The municipal authorities claim that the case of *Village of Oakland v. Stoecklin*, 81 O. S., 332, controls and should guide the court in passing upon the legality of this municipal action, regardless of the wording of the ordinances.

The old municipal law of assessments provided in Section 2264, Revised Statutes, that assessments could be made by the *foot front* of the property bounding and abutting upon the improvement.

In 1893 the Supreme Court, in *Harland v. Columbus*, 50 O. S., 471, held, that "if a lot abuts lengthwise on the improvement, but fronts breadthwise on another street and not on the

improvement, the lot should be deemed as fronting breadthwise on the improvement, and be assessed for the number of feet on the improvement that it would have in such case, and no more."

The front of a lot or property is that part or side which is most conspicuous or important, and from the manner in which it is laid out or in which it has been built upon, and used and occupied by the owner constitutes the foremost or forward part or side of the property.

This interpretation of the law was approved and affirmed in *Sandrock v. Columbus*, 51 O. S., 317; and *Toledo v. Sheill*, 53 O. S., 447. The latter affirmation was made in 1895.

The rule thus fixed for assessing corner lots or properties was that they were to be assessed for as many feet, at the fixed rate of assessment per foot front, as were contained on the side of the lot or property which constituted its front, even though that might not be the side which abutted on the street for the improvement of which the property was being assessed.

In 1902 the new municipal code was passed (96 O. L., 39, Sec. 50) changing the wording of old Section 2264, so that the new rule for assessing read "by the *foot frontage*," instead of "by the *foot front*." Bates' Rev. Stat., 1536-210.

This section was amended April, 1904 (97 O. L., 98), but no change was made in the wording of this part of the section.

January 18, 1910, the Supreme Court was called upon to interpret the meaning of the new assessment clause in *Village of Oakland v. Stoecklein*, 81 O. S., 332, and held that:

"Since the municipal code passed October 22, 1902 (96 O. L., 20), repealed Section 2264, Revised Statutes and defined the following mode of assessing the costs and expenses of street improvements "by the *foot frontage* of the property bounding and abutting upon the improvement," the rule of assessment laid down in *Haviland v. City of Columbus*, 50 O. S., 471, is abrogated, and municipalities are authorized to assess upon an entire lengthwise frontage of a lot abutting upon the improvement."

There is no real difference between the terms "foot front" and "foot frontage." they both meaning the linear extent measured, by the foot, of the front part of the lot or property.

The Supreme Court, however, has found an intention of the General Assembly, by amending the old section (2264, Rev. Stat.), to change the meaning thereof as the same had theretofore been interpreted by the Supreme Court.

Hence, the change in the rule of assessment by the rule of feet front was based entirely on an intention of the Legislature to do so from the fact that the old law was changed by substituting the word "frontage" for the word "front."

The General Code passed February 14, 1910, approved February 15, 1910, contains the same words in Section 3812 for assessing the feet front of a property as were used in Section 50 of municipal code (Bates' Rev. Stat., 1536-210).

April 22, 1910, Section 3812, General Code, was amended (101 v. 134), so that this method of assessment was provided for in the exact language of Section 2264, and Section 3812 of the General Code was repealed. The method of assessment is now "by the foot front."

By the same rule of construction applied in *Village of Oakland v. Stoecklein*, this court, if it follows the Supreme Court, as it is bound to do, must hold that the Legislature by changing the wording of "foot frontage" back to "foot front" meant to repeal its abrogation of the rule in the Haviland case and return to the old rule with the interpretation of and construction placed upon it by the Supreme Court.

Moreover, there is a settled rule of construction that governs in this case, and may be found in *Black on Interpretation of Laws*, page 161, with citation of cases supporting the text.

"When a statute has received a settled judicial construction, and is afterwards re-enacted by the same Legislative power, in the same terms, or in substantially the same language, for the same purpose and object, it will be presumed that the Legislature intended that the re-enacted law should bear the same interpretation which was given to its original, and it will be construed accordingly, unless a contrary intention is very clearly shown."

The interpretation and construction of the old section with the wording "foot front" became a part of that rule of assessment therein laid down. *Black on Interpretation of Laws*, 369, and any terms used in the new law which had received judicial

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construction when used in a former statute, must be taken with the meaning formerly given to them by the courts which construed them. *Whitcomb v. Rood*, 20 Vt., 49; *Woolsey v. Cade*, 54 Ala., 378.

Section 3812 of the General Code having been amended by the General Assembly (101 v. 134) so that the third method of assessing property for the improvements of streets on which it abuts, is re-enacted in the same terms and identical language used in a former statute, to-wit, Section 2264, and for the same purpose and object, it will be presumed that the General Assembly intended that it should receive the same interpretation which was given to its original.

The interpretation and construction made in *Haviland v. Columbus*, having been made and approved in three decisions of the Supreme Court, furnishes a rule that binds this court, and the rule in the *Haviland* case must prevail.

At the time the ordinances of the city of Barberton were passed, the city could only assess "by the foot front," etc., according to the amendment of 3812, General Code, made April 22, 1910 (101 O. L., 134).

The Barberton legislation and proceedings had pursuant thereto levied an assessment "by the foot frontage" and giving to this term, when used in connection with the making of street assessments, the meaning given to it by the Supreme Court in *Oakland v. Stoecklein* in 1910, the municipality of Barberton was without authority to make an assessment whereby lots could be assessed on the entire lengthwise side abutting on the improvement, because the statute as it then existed only empowered the municipality to assess "by the foot front," which term had been theretofore found by the Supreme Court to bear a different meaning from "foot frontage" and called for and limited the assessment to the number of feet in the side on the front of the lot whether the front were on the improvement or not.

In view of the legislation existing on this subject and the interpretations of and constructions placed thereon by our highest judicial authority, this court is obliged to sustain the contention of the plaintiffs and accord them the relief asked for.

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INCREASE OF SALARIES OF POLICE FORCE.

Common Pleas Court of Montgomery County.

THE STATE OF OHIO, EX REL CHARLES FERRIS ET AL, v. GEORGE W. BISH, AS AUDITOR OF THE CITY OF DAYTON, OHIO, ET AL.

Decided, March 9, 1912.

Municipal Corporations—Merit System and the Police Department—Increase in Salaries of Police and Firemen—Provisions of the Statute as to Dismissals Limited to Individuals—Purpose of the Statute—Right of Dismissal Taken from the Appointing Power, but Still Rests in Organizing Power—Tenure of Office of Policemen—Bad Policy of Denying Increase in Compensation During Service—Confusion in the Holdings of the Upper Courts with Reference to Official Status of Policemen and Firemen.

1. Policemen and firemen do not hold their positions for a fixed and definite term, and hence are not subject to the provisions of Section 4213, P. & A. Anno. General Code, which forbids the increase or diminishing of salaries of officers, clerks or employes of a municipality during the term for which they were appointed or elected.
2. A municipal council has authority to pass an ordinance providing for the number, salaries and bonds of members of the police department, repealing at the same time the former ordinance under which the department was operated; and where such action is taken by council all members of the police force lose their positions as of the date of the repeal of the former ordinance under which the department was theretofore operated, this method of removal being excluded under Section 4484, P. & A. Anno. General Code, which refers only to individual removals for cause; and it thereafter becomes the duty of the board of public safety to appoint members of the force under the contemplated reorganization and upon such terms as council has provided.

Mattern & Brumbaugh, for relators.

F. S. Breene, City Solicitor, and *A. J. Dwyer*, Assistant City Solicitor, contra.

SPRIGG, J.

This proceeding is in mandamus, brought upon the relation of one Charles Ferris, on behalf of himself and some hundred and sixty-six other persons, against the city auditor and city

treasurer of Dayton, to compel the auditor to issue and deliver warrants and vouchers to the relator and his fellow complainants in their favor for the various amounts which he claims are due them for salaries as members of the police force of the city of Dayton, and to compel the treasurer to pay such warrants. These amounts are set out in the petition opposite the respective names of the various claimants.

The petition was quite skillfully drawn, so that only a bare statement of the actual facts, necessarily involved in the obtaining of a writ of mandamus, is therein set out. That is to say, the pleader alleges that the relator and his fellow complainants are duly constituted and qualified members of the police force of the city of Dayton; that by a certain ordinance passed by the city council their salaries were fixed at certain amounts; that these salaries were paid bi-monthly; that in February, 1912, the city auditor failed and refused to issue warrants and vouchers for more than a certain proportion of such bi-monthly amounts, although the services therefor had been performed; that the city treasurer refused to pay any greater sums than the warrants of the city auditor called for and that therefore there is due and owing to each of the one hundred and sixty-seven claimants a certain balance, to obtain the payment of which they are entitled to the writ of mandamus as prayed for. This statement of facts standing alone is, in the opinion of the court, sufficient to constitute a cause of action and therefore the demurrer filed by the defendants will be and is hereby overruled.

With the understanding that this demurrer would probably be overruled, the defendants filed an answer and proceeded with the hearing upon the merits, it being understood by all parties and the court that this is an amicable proceeding to test the question of the right of the city to increase the salaries under any circumstances of the various members of its police force after they have been duly appointed. This answer, therefore, admits all of the facts so alleged in the petition, but sets out further that the relator and his fellow claimants were all members of the police force prior to the city ordinance set out in the petition as being the ordinance regulating positions and fixing the salaries; that at the time of their respective appointments their salaries were not as fixed by the ordinance pleaded in the petition, but

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in fact were the exact amounts paid them on February 17, 1912, by the city treasurer upon the warrant of the city auditor; that the complainants are officers or employes of the city, appointed for regular terms; that their salaries could not be increased during such terms; that, therefore, the ordinance pleaded in the petition, so far as the increase in the salaries of the police force is concerned, is void and of no effect; that the salaries, as warranted by the auditor and paid by the treasurer on February 17th, are, therefore, the correct salaries to which the claimants are entitled, and hence, that the writ of mandamus should be refused and the petition dismissed.

The facts in the case are about as follows: prior to December 21, 1906, there had been an ordinance, passed by the city council of Dayton, providing for the number, salaries and bonds of the members of the police department of the city. Naturally, as time passed and conditions changed, as the standard of life improved and the cost thereof advanced, as the population of the city increased and the limits of its territory were enlarged, it became evident to the city fathers that a larger police force was necessary for the proper protection of the citizens and their property; and that the members of this force—because of the changing conditions, and perhaps also, to some extent, because of meritorious service—were entitled to greater remuneration for their labors. Therefore, on December 21, 1906, the city council passed an ordinance numbered 7050, and entitled "An ordinance to provide the number, salaries, and bonds of the members of the police department, and to repeal certain ordinances therein named."

As the title would imply, the entire force is provided for by this ordinance, salaries and bonds fixed, and Section 21 thereof repeals the former last preceding Ordinance No. 6789, which provided the number, salaries and bonds of the members of the police department, and also repealed Ordinance No. 6853 which had been passed to supplement and amend Ordinance 6789. Section 22 of Ordinance 7050 providing that it should take effect on January 1, 1907.

After the passage of this ordinance, the police department was reclassified and reorganized, the members either appointed or reappointed, and the department resumed the even tenor of its way

under the new classification and salaries. Then suddenly after having performed their duties for five years under the increased salary rate, the police force of the city of Dayton was notified, on February 12th, that the auditor and treasurer could no longer pay them at this increased rate, but could only issue warrants to them for the various amounts which they had received prior to the passage of the ordinance of December 21, 1906. This made a difference to the members of the force in amounts ranging from five to fifty dollars a month, and naturally meant so much to the very existence of themselves and their families, that legal advice was sought and action taken which finally eventuated in this suit.

To be called upon to decide this matter, places the court in not the most enviable position, since it raises questions of vital importance to the parties and of great moment to the citizens of the municipalities of the state, which have all, however, been heretofore, presumably, presented to the supreme tribunal of this commonwealth.

The questions, while not new in the state, are, to say the least, novel. Among the various judicial reforms which are now being suggested at the Constitutional Convention and in the public press, we might perhaps, in our humility, be allowed to offer this further one, to take precedence over all of the rest, upon the theory that every reform should begin at the source, and that is, to require the Supreme Court to give its reasons for all decisions upon new questions, and when any decision is based upon a prior ruling of that court, that it give the title of such case and where the same is to be found. This would not only facilitate litigation, by aiding the attorneys in their presentation of causes, and the nisi prius courts in deciding them, but would also protect the supreme tribunal itself from being led into the absurdity of conflicting decisions without a specific overruling of a former opinion.

Before entering into a discussion of the case itself, we might say that this court feels bound by the decisions of the circuit courts of the state, only so far as we may agree with the logic and legal reasoning upon which their conclusions are based. Furthermore, in view of the fact that the Supreme Court, both by

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decision and rule, has said that only the syllabi of its reported cases comprise the law of the state, we do not feel bound to follow its rulings in cases covering important points, which that tribunal is supposed to have decided, but which it did not see fit to dignify with the reasons and authorities for its conclusions. *Adelbert College v. Wabash E. R. Co.*, 171 Federal, 112; 39 O. S., 141-145; Rule 6, 5 O. S., Preface 7; 73 O. S., Preface 10.

The question now before us is, as to whether or not the members of the police department of the city of Dayton are such officers, employes, or agents, as would preclude them from having their salaries increased or decreased during their service.

In the first place, it might become important to discover where and how the police department of the municipality gains its origin. It is entirely a creature of statute, and is provided for in Sections 3617 and 4374 of the General Code, which grant such general powers to municipalities, and read as follows:

“To organize and maintain police and fire departments, erect the necessary buildings and purchase and hold all implements and apparatus required therefor.”

“The police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen, and other police court officers, station-house keepers, drivers, and substitutes, as are provided by ordinance or resolution of council.”

From these it may be seen that, while the police department of each city is provided for by statute, the Legislature delegated to the city council the power to provide the number of policemen which should comprise the force of its municipality.

The Legislature then further provided (Section 4214 of the General Code) that council should also have the power to fix the various salaries of its officers, clerks, or employes, and by Section 4213 provided that none of these salaries so fixed should be increased or diminished during the term for which the incumbent was elected or appointed.

For the purpose then of relieving council from the distracting and corrupting influences which would probably issue from the dispensation of official patronage, and also to lessen the opportunities for endangering the efficiency of the various depart-

ments of the city, and in a measure to prevent the upbuilding of political machines, the Legislature provided, by Section 4211, that council should have legislative powers only, and should have no right to either appoint or confirm any officer or employe in the city government except those of its own body.

Section 4367 of the General Code then provides for the director of public safety, and in the next section states what his powers and duties shall be, giving him, however, no direct control over the force itself, but leaving that to be taken care of by Section 3272, which provides that the chief of police shall have exclusive control of the stationing and transferring of the force itself; with reference, however, to such rules and regulations as the director of public safety might prescribe.

We thus find ourselves at this point: a police department authorized by statute in cities; the number of members and their salaries to be fixed by council; the provision for a director of public safety, but no method of appointing persons to occupy the places provided by the city council. Where, then, does this power lie? It is provided for in Chapter 12 of the General Code of Ohio, Section 4477, *et seq.*, which creates what is known as civil service in cities. This chapter provides for a civil service commission, the method of appointing the same, a classified and unclassified list of appointees, examination, appointments, dismissals, and in fact everything relating to what is known in the state as the "merit system."

On the question of dismissal, Section 4484 reads as follows:

"Nothing herein shall prevent the dismissal or discharge of any appointee by the removing board or officer, except that the chiefs and members of the police and fire departments and of the sanitary police shall be dismissed only as provided by law, and the appeal therefrom shall be made to the civil service commission under such rules as the commission may adopt."

Section 4484 provides that the chief of police and director of public safety may suspend a member of the police force for thirty days, pending an investigation, while Section 4489 defines the method by which a member may be suspended, reduced in rank, or dismissed from the department.

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These, then, about cover the statutory provisions pertaining to the police department of a municipality which become in any wise important in the case at bar; and we will therefore proceed to take up the decisions which have actuated this suit and brought it before us, together with the reasoning upon which those decisions are based.

In the year 1910 a contention arose in the city of Painesville, in Lake county—which city by the way contained some five thousand inhabitants—between the auditor and treasurer and a man by the name of Spaller, who was at that time a patrolman on the police force of that city. 13 C.C.(N.S.), 577.

Mr. Spaller had been appointed a police officer at a fixed salary in the same manner as had the claimants in the case at bar. Several years after his appointment the city council, feeling perhaps that his services had been meritorious, and probably recognizing that the scale of living had greatly advanced in this country, increased his salary from \$720 to \$840 per year. It would seem that no question arose at the time, but that some three years later the council in a wave of economy, or, perhaps to test the question, passed another ordinance reducing his salary to its original amount. To this Mr. Spaller took exception, claiming that council had no right to reduce his salary, demanded a warrant from the auditor, which was refused, and thereupon instituted a suit in mandamus to compel the auditor and treasurer to pay him his salary at the increased rate. The suit seems to have originated in the Circuit Court of Lake County, and instead of filing a petition, such as we have in the case at bar, counsel for Mr. Spaller set out all of the facts attending his appointment, increase, and subsequently decrease in salary. and to this petition a demurrer was filed.

Just what Mr. Spaller's ideas on the question were is hard to conceive, as it would appear that no matter which way the court decided the case, that gentleman was bound to be the loser. Nevertheless, the circuit court took up the question and decided. first, that a duly appointed patrolman of the police department of the city is an officer within the meaning of the laws of Ohio; and, second, that a city council has no power to increase or diminish the salary of a police officer appointed under the civil

service provisions of the municipal code during the term for which he was appointed, which is during good behavior.

There do not seem to have been any briefs filed in the case. At any rate, none are reported by the circuit court. But the reasoning of the circuit court was about to this effect: that a policeman is an officer of the city government, because he is so spoken of every place in the statutes of Ohio. Thus, General Code, 5251, speaks of "any constable or police officer"; and Section 13474 speaks of a "sheriff, constable, marshal or police officer."

We do not know whether the circuit court, reasoning *a priori*, would be forced to the conclusion that a sheriff or constable could not be a public officer, because the code does not speak of them as being sheriff officers or constable officer, but we do know that any line of reasoning which attempts to fix a person as a public officer, simply because of his name, is faulty, and bound to lead to absurdities. We do not say that a policeman is not a public officer, since, in our opinion, that appellation usually involves the broad consideration whether the incumbent of the particular position in question owes some general duty to the public at large, and is not entirely circumscribed by the rules and regulations of the appointing power. That is, a public officer is one who is elected or appointed to discharge a public duty, and upon whom the public has the right to call for the discharge of that duty.

This definition, of course, might well include the members of the police and fire departments. However, we do not believe that the court was called upon to decide that question unless they were fearful lest the ruling in the case of *State of Ohio, ex rel Attorney-General, v. Craig*, in the 69 O. S., at page 263, might force them into holding that a policeman was a public officer, in order to bring him within the purview of the statute. That they did not consider the Craig case, however, is apparent since they say that, even if a patrolman is not an officer, he certainly comes within the designation of the term "employee."

As we before noted Section 4213 of the General Code provides that the salary of no officer, clerk or employe may be increased or diminished during his term. The Craig case above cited

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holds that a health officer is not an employe but an appointee; in fact the Supreme Court in that case, on page 246, says as follows:

“Is the health officer an employe, as that word is used in the statute? We think not. He is known as the health officer throughout the statute, and, in Section 2115 is spoken of as an appointee, but nowhere as an employe.”

The Supreme Court in this case does not state whether a health officer is a public officer or not, but such might appear to be their idea by implication, because of the fact that that proceeding was an action in quo warranto against the health officer.

This would seem to leave us in an interminable tangle, so far as the upper courts are concerned, as to just what a policeman is. But while this court does not feel that it is necessary to decide that point in order to reach a proper conclusion in this case, we will say, as mere *dicta*, that in view of the very important duties which a policeman has to perform, and the grave obligations which he owes to the public, there might be good reason for holding that he is a public officer.

The circuit court in the Painesville case then proceeds with its reasoning as to why a policeman, being an officer or employe, may not have his salary increased or diminished during the term for which he is appointed. It is of course admitted that the section of the statute which interdicts the increasing or diminishing of salaries refers to those officers or clerks or employes who hold their positions for a term. The circuit court says, that it was argued that a patrolman holding his position during fitness or good behavior was not appointed for any term, but that they could not concur in that reasoning, since in view of the fact that a patrolman once appointed serves until he is removed for cause, it necessarily follows that he is appointed for a term, to-wit: for that period of time during which he is permitted to hold his office.

To this proposition we only desire to say that it is an illogical conclusion based upon a false premise. In the first place a policeman may not serve as such until he is removed for cause;

and in the second place, if this reasoning were logical, it would be difficult to see how it could ever be said that any position was not held for a term, since even those incumbents who hold their positions at the pleasure of the appointing power, certainly hold them for that period of time during which they are permitted to hold them. Moreover, this conclusion of the circuit court would certainly not represent the law of this state.

In 2 Ohio C.C.(N.S.), at page 167, there is reported a decision by the Circuit Court of Stark County—of which court Judge Donahue, now on the Supreme bench, was then a member—which holds that a health officer is not such an officer as will come within the purview of the statute relating to the increasing or diminishing of the salary of an office during the term thereof; and this for the reason that such officer only holds during the pleasure of the health board; and that, therefore, he has no term of office.

The court might add that this case is well considered and we know of no reason why Judge Donahue, who concurred therein, should have any different views on the questions there decided, at this time.

Here again we find that the conclusions of the Lake county circuit court, in the Painesville case, whether right or wrong, are based upon the most questionable logic. It was on such logic as this that the case was decided, and it was upon such reasoning that it was taken into the Supreme Court of the state of Ohio, and there affirmed without report.

Leaving that case for the time being, let us look at the case of *State of Ohio, ex rel, v. Searcy, Mayor of Portsmouth*, reported in the 11 C. C. Reports (N. S.), at page 521. The facts in that case, in brief, were as follows:

The police force of the city of Portsmouth, prior to November, 1908, consisted of a chief and twenty patrolmen. In November, 1908, however, the city council passed an ordinance repealing the former ordinance, and reduced the force of patrolmen from twenty to eleven. Under this ordinance the board of public safety reclassified its police force, and chose the eleven members of the old force who pleased it the best, sent their names to the mayor for appointment on the reorganized force, and notified

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the nine remaining patrolmen that their names had been dropped from the pay roll. These men then brought suit in mandamus, to be restored to their rank and place upon the police force, claiming that they had been appointed under the merit system, and were entitled to all of the rights accorded thereunder. The relators themselves, in that case, never seemed to question the right of the city to reduce its force, but claimed that this reduction could only be made along the lines of seniority and service. In other words, that if the force was reduced, the discharging of the members would have to be done in the reverse order of their appointment.

The circuit court, however, in deciding this case, held that in the municipal code, city councils were authorized to fix the number of employes in the department of public safety, and that this gave them the further authority to reduce the number of patrolmen as council might see fit; and, also, that in reducing the force in this manner, the board of public safety might reclassify and reorganize the department, retaining or discharging any members of the old department at its pleasure.

This seems to us to be a well reasoned case. Like the Painesville case, it also was carried to the Supreme Court of the state of Ohio, and there affirmed without report. (80 O. S., p. 740.)

Now, in what position do we find ourselves by reason of these two cases, both affirmed by our Supreme Court? A police force in the city, appointed by the board of public safety, under and by virtue of an ordinance of the city council, the members of which force are officers who hold their positions during fitness or good behavior, that is for a term, since they can not be discharged save for cause, and being thus appointed for a term, their salaries may not be increased or diminished by ordinance; but the city council may by reorganizing and reducing the number of the force at its pleasure end this so-called term of office at its will. And, further, this reduction in the force may affect any of the members which the board of safety may desire to get rid of. In other words, a policeman has a term and at the same time he has not, and it may thus be seen that the circuit court in the Painesville case was reasoning on a false premise when it said that a policeman might continue as such during life and fitness for the position.

It appears to this court that it is the height of contradiction to say that a man holds his position for a term, because one branch of the city government can not discharge him except for cause, and in the same breath to say that another branch of the city government may discharge him any time it pleases, by merely reorganizing that branch of the service and changing the number of positions. This might be the case if the Legislature had and could have delegated to council the power to entirely abolish the office of policemen in the various municipalities, but as will be seen later, we do not think that this was done.

The truth of the matter seems to be that the Circuit Court of Lake County did not consider the question thoroughly; and we are forcibly impressed, at this time, with the prophetic words of Judge Price of the Supreme Court of Ohio, in the case of *Railway Company v. Greenville*, 69 O. S., p. 487. In this case, after a long discussion of the various points upon which a case was supposed to have been affirmed, the learned judge apparently in a philosophic vein, says, upon page 499:

"This investigation of that record may illustrate the value of an unreported case as an authority."

And it is a fact, that whenever a case is decided by our Supreme Court without report, the bench and bar are at a loss to know upon what grounds the lower court was affirmed; and very often the affirmance is due to reasons and circumstances entirely different from those reported in the lower court's opinion.

We, therefore, feel at liberty to take up this question *de novo*, and decide it according to our own lights. It is not our desire to indulge in judicial legislation, nor do we believe that it is our province to read into the statutes anything which the Legislature did not intend should be there, for, as our Supreme Court has said in the case of *State v. Baldwin*, 77 O. S., p. 552:

"We have only to determine what the Legislature in its wisdom has prescribed."

But we do think that since the courts continually refer to the wisdom of the Legislature, they should endeavor to accord that body the quality as well as the term.

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The question before us involves a great public interest in the larger municipalities of this state, which we are convinced the Legislature in its wisdom realized, but which the Supreme Court in its affirmation of the Painesville case never considered.

As we have before stated, the city of Painesville has only some five thousand inhabitants, and we can not believe that the Supreme Court would have affirmed that case without report, had it realized the far reaching effect which it might have on the public of this state.

The two organizations involved in this question, that is, the police and fire departments, constitute the two great arms of government, for the protection of the persons and property of the citizens; and any act or decision calculated to affect their efficiency or integrity is aimed not only at the members of those organizations, but at the entire citizenship of the commonwealth. The construction placed upon the law by the Painesville case, would mean to give a bad effect to an otherwise good law—an effect which we do not believe the Legislature ever intended. By this decision the civil service law of this state, which has come to be known as the "merit system," might better be termed the "demerit system." Members of the police and fire departments, not being able to receive increased pay during good behavior or fitness, would have no incentive, other than the dictates of their own conscience, to remain good so long as they were not detected. It is placing a premium on dishonesty to say that a man may never receive an increase in compensation during his fitness or good behavior; and we do not not believe that the Legislature of this state so intended.

Times change and men and conditions change with them. Families increase in size, the cost of living advances, but the first principle of self-preservation continues forever; and this court is not willing to go on record as holding that the Legislature of the state of Ohio intended to place the department of public safety in this state in the same condition which it is now in, in some of the larger cities of this country, where members of the police force, after having received one hundred dollars a month for twenty years, died leaving two and three hundred thousand dollar estate, with an astonished public inquiring,

"Where did they get it?" The constabulary of this state in general, and of this municipality in particular, has always borne the highest reputation, and we do not believe that it was the intention of the Legislature to pass any law which might tend to affect the integrity or efficiency of the force.

There is in our mind just one legal question in this case which needs to be decided; and, in deciding this, we hope to give reasons which will show that our conclusion is drawn from sound logic, and not from any feelings of bias or prejudice.

As we have heretofore stated in this opinion, the Legislature provided for a police force in all municipalities in the state (Sections 3617 and 4374, General Code.) Then realizing, of course, that different municipalities would require greater or less protection; and also, that as municipalities increase or decrease in size, they might need a greater or smaller force; and, recognizing the fact that these conditions would be foreign to the Legislature's knowledge and power of action, it delegated this power of fixing and increasing or decreasing the number of men on the respective forces, to the councils of the various municipalities.

For the reasons stated in another portion of this opinion, the appointing power was forbidden the city council and was placed in the board of public safety, to be exercised, however, only under the regulations of the civil service laws. That is to say, the Legislature created the office of "policeman" and "fireman"—if we may be permitted so to designate them—and gave city councils the right to say how many of such officers there should be in the respective municipalities; but gave to the board of public safety the power to appoint incumbents to fill these offices after the number had been fixed by council.

Now, whether these policemen and firemen are officers or employes, who employs them, and who do they serve? To our mind, the answer to this is, the state and the cities, and their inhabitants. That is, we do not think that they are employes of the city council or of the board of public safety, but of the people at large; and, further, that the Legislature bestowed upon each municipality the right to have such organizations, delegating to several different branches of the municipal government the duty of establishing their number, and appointing the members.

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To be sure, the police department and fire department, being created by statute, they are wholly within the control of the Legislature creating them. That is to say, the mode of appointment may be altered at pleasure, the office may be abolished, and the compensation taken away from the incumbent unless forbidden by the Constitution. This power, however, is inherent in the Legislature, and no attempt was ever made to delegate this power, namely, of abolishing the office or employment of policemen, to any branch of any municipal government. That is to say, the Legislature said that municipal corporations should have a police force, in such number as council saw fit, which might be changed from time to time when the necessities of the occasion required.

What power was it then that was delegated to the city council when they were given the right to increase or decrease the number of the force at pleasure? As may be seen, it was not the right to abolish the office or employment itself, because if this were so, upon a decreasing of the force, the remaining incumbents would have no right to serve, since the office had been abolished.

No, the power that was delegated to the city council can be construed into nothing other than a power to remove men from or add men to the force, by simply decreasing or increasing the number of positions to be filled. To say that this right applies to the position and not to the incumbent, takes you back then to the proposition that if this be so, the Legislature must have delegated to council the right to abolish the office or employment itself, and this we do not think the Legislature did or intended to do; and we doubt if it had the power to do it if it would desire.

Let us consider then Section 3617 of the General Code of Ohio, empowering city councils to establish police and fire departments. As we before noted, it reads as follows:

“To organize and maintain police and fire departments, erect the necessary buildings, and purchase and hold all implements and apparatus required therefor.”

Referring back now to the preceding section of the code, 3616, we find that it reads as follows:

"All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Thus, 3617 creates the offices of policemen and firemen, and delegates to the city council not the power to create or abolish those offices, but to organize and maintain them. While, on the other hand, Section 3616 makes it obligatory upon city councils to so organize and maintain such departments as created by Section 3617.

It is true that Section 3616 says, "and council may provide by ordinance or resolution for the exercise and enforcement of these powers," but we believe that this language, although permissive in form, is peremptory in fact in its relation to Section 3617. That is, where power is given to public officers by act of the Legislature, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form is in fact peremptory and permits of no discretion. *Supervisors v. United States*, 4 Wall, 435-445-446-447; *Mason v. Fearson*, 9 Howard, 249-259; *Mayor v. Furze*, 3 Hill, 612; *Turnpike Co. v. Miller*, 5 John's Chancery, 100.

Certainly, the establishing and maintaining of a police and fire department involved a great public interest, and we do not believe that under Section 3617 the city council would have any right to abolish the police or fire department entirely; and therefore, when they reduce the number of either force, they are merely changing the personnel and not affecting the position or the office.

We are then confronted with this situation: a municipality with its various branches of government, one of which, the board of safety, has the right to appoint members on the police or fire departments; and the other of which may, in a circuitous manner, perhaps, but none the less may discharge them by reducing the force at its pleasure; and this is as it should be, for what an egregious situation would a municipality be in, if a sudden financial boom should affect a city in such a manner that an increased force was necessary, and yet this force could not be decreased when a financial stringency had reduced the population of the city to perhaps less than its normal condition.

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It may thus be seen that the power of council to increase and decrease the police force is, on the grounds of public policy, a wise one, and when we consider this power in the light of the Searcy case, in the 11 Circuit Court Reports, heretofore cited, we are forced to the conclusion that whensoever council desires to reduce its police force for any reason, no member of that force has any prior right to his position thereon. And, further, that upon the reduction in number, the board of public safety may reorganize, reclassify, and reappoint without any consideration, for the length of service, meritorious conduct, good behavior or anything of the kind. This being true, can it be said that the members of the police or fire departments hold their position for a term? We think not.

In deciding the Searcy case above cited—which case, as we have heretofore said, was affirmed by our Supreme Court—the circuit court uses the following language:

“It is insisted that the action of the city authorities, if upheld, would tend to destroy the entire purpose of the merit system. It is undeniable that the police force might be radically changed and new members placed thereon, but after all that may or can be done, the merit idea is not destroyed, for in any event as in this case, the patrolmen retained must be merit-men—men who passed the requisite examinations.”

And further on:

“The merit system was to meet the contingency of increase in the force and of individual removals for cause.”

This language in effect admits that the tenure of a policeman's office is, to say the least, precarious, since he may lose it at any moment at the will of council, but that the merit system was not adopted for the purpose of fixing the tenure of office, but to maintain a high efficiency among its members and to prevent the individual members from being discharged for personal reasons, at the whim of every mayor or director of public safety, the political complexion of which officers may change at each succeeding election. That is to say, the Legislature took the right to discharge, except for cause, away from the appointing power, but left it in the hands of the organizing power, the city

council, to change the number; and, consequently, the membership of the force, at its will.

We, therefore, come to the question at this time as to what was meant by the Legislature in Section 4213 when it said that salaries of an officer, clerk or employe shall not be increased or diminished "during the term for which he was elected or appointed." The word "term," when used in reference to the tenure of office, means ordinarily a fixed and definite time; that is, a specific period of time during which the incumbent is certain of holding the position, providing the position itself be not abolished by the creating power. This definition has been held to be the law in a long line of decisions which may be found in "Words and Phrases," Vol. 8, p. 6920.

"Term of office" has been defined in this state, in the case of *Miller v. Massillon*, heretofore cited, as meaning "to limit." In that case, in speaking of the health officer, the court says:

"The word 'term' has significance. It simply means to limit. That is, during the period that the office is limited. During that period his salary shall not be increased; but in this case, there is no limit fixed by law, and it is not a term for the reason there is no limitation."

In that case, to be sure, the health officer served during the pleasure of the board, while in the case at bar, the claimants, in effect, serve at the will of council. In so far as the civil service rule—namely, that they shall serve during fitness—is concerned, we are free to confess that a very difficult question arises as to whether or not the words "during fitness or good behavior" establish a term of office.

As we have noted, the circuit court in the Painesville case decided that they did, and we might add, simply for the purpose of evidencing a more or less thorough examination of the subject, that the Supreme Court of Illinois likewise seemed to be of that opinion, in the case of *The People, ex rel, v. Loeffler*, 175 Ill., at page 603, although the remarks of the court on that question are probably only *dicta*.

We admit of some uncertainty upon this proposition ourselves. In the construction of the statutes, words and phrases shall be taken in their plain, ordinary or usual sense unless they are

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technical words and phrases, which shall be understood according to their technical import. In a day's travel one would probably not encounter a man of ordinary education, but would say that holding an office during fitness of good behavior was not holding it for a term. And yet, of course, public opinion is not the source from which the meaning of our language is to be derived, according to the law, although that, in fact, is probably the greatest source of legislative diction.

Going, however, to Webster's Dictionary—one of the standards of our language—we find that a term means the time for which anything lasts, any limited time, such as the term of life; and it occurs to us that where the courts have probably gone astray is not in the defining of the word "term," but in a misunderstanding of the definition itself. That is, the term must have a certain ending. It must have a specific limitation, and not be based upon a limitation which arises by reason of some possible contingency. Take for instance the term of life. We are certain we are going to die. In one way or another our lives may be prolonged or shortened a few years more or less, but that we will die is certain. While, on the other hand, the phrase "during fitness or good behavior" carries no positive limitation as to duration. A person may behave himself properly for a day, for a year or for a lifetime, and no person is qualified to state definitely when any other person's good behavior is going to end. This, if sound, would of course preclude the phrase "during fitness or good behavior" from having any fixed limitation, unless we read into the statute, as did the circuit court in the Painesville case, the meaning that policemen should hold their positions during life or so long as they are fitted therefor; thus making the term of life the real limitation on the tenure of office.

This strikes us as reading something into the statute which is not there, and moreover, which is not true in law, since a policeman though perfectly fitted for duty and of the highest moral character, may at any time lose his office by a reduction of the force at the will of the city council.

However, we do not believe that in the case at bar it becomes necessary to decide this mooted question; for having found that

a term is a fixed and definite period during which the incumbent is certain of his place, the fact that a policeman is liable to lose his position at any time by reason of an action in the city council, makes his tenure of office so uncertain and indefinite as to preclude him from being brought within the purview of the statute, making it unlawful to increase or diminish the salaries of any officer, clerk or employe during the term for which he was elected or appointed. We do not believe that any official who may lose his position at any time at the will of any branch of the municipal government was ever intended by the Legislature to be included in this statute, and to say, as did the court in the Painesville case, that they are so included, and that the object and purpose of including them was to make them independent of the whim of council or the influence of public officials, and to free council and the public officials from importunities and harassments by such office holders for increased compensation, is, to say the least, begging the question. That policemen and firemen are not made independent of the whim of the city council and the board of public safety, is clearly shown in the Searcy case, which holds that the entire complexion of the police force may be changed at will; and to deny them the right to strive for increased remuneration is to take from them the hope which every human being, who has devoted himself to a life work, has to better his condition and improve the surroundings of himself and family by efficient service and loyalty to his trust.

The true purpose of the law was to prevent office seekers who accept an office for a fixed term of years, at a specific salary, from using their official powers, after having entered upon the duties of such office, for the purpose of increasing their own salaries or decreasing those of political opponents.

We do not believe that it was ever intended to affect the patrolmen or firemen of any municipalities of this state, and, in our opinion the Legislature placed them in a position where a proper construction of the law would leave them unaffected thereby.

The position we take is more strongly impressed upon us at the present time, by reason of a pending crisis now confronting the board of public safety, and concerning which we believe judicial

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notice may be taken for the purpose of illustration. For some reason, unimportant in this connection, the funds of our safety department have reached the low ebb and it may become necessary in the near future to retrench. The population of the city has not decreased, nor have its limits in any way been narrowed. That is to say, the public needs demand as large a number of patrolmen for the protection of the citizens and their property today as they did in the days of a more plethoric safety fund. And still, under the apparent holdings of the various unreported decisions of the Supreme Court, there can be no reduction of salaries, even if absolutely necessary, but the force itself may be so reduced as to cover the financial stringency and tax-payers left with inadequate police protection, to become the prey of marauders and social parasites. This we do not believe to have been the intention of our Legislature. In our opinion, in Section 3617 of the General Code of Ohio, the power to organize and maintain, includes the power to reorganize, and that council may reorganize in any way that it sees fit. If in its reorganization it absolutely repeals a former ordinance organizing the police force, on the day this repeal goes into effect all of the members of the force lose their positions, and upon the reorganization they must be reappointed by the board of public safety, either at the same or an increased or diminished salary, as council may have provided. This is undoubtedly the theory that the various city councils have adopted, and this theory has been fully acquiesced in by the public for years. We know of few better methods for construing a law than by that of practical construction.

The Supreme Court of Wisconsin, in the case of *Scanlan v. Childs*, 33 Wis., 663, says in its first syllabus, "that the general understanding of a law, and constant practice under it, unquestioned by any public or private action, is strong if not conclusive evidence of the true meaning." See, also, *Rogers v. Goodwin*, 2 Mass., 475; *Ry. Co. v. Mills*, 85 Mich., 635 (2d Syllabus).

It is our opinion, therefore, that when the council of the city of Dayton passed Ordinance No. 7050 on December 21, 1906, reorganizing the public force and repealing the former ordinance of organization, it was acting fully within its powers. That, by

reason of such action, all of the members of the police force lost their positions on January 1st, 1907, and it became necessary for the board of public safety to appoint members under the reorganization upon such terms as council had provided; and further, that this method of removing the incumbents was excluded from Section 4484 of the General Code of Ohio, which only refers to individual removals for cause.

We, therefore, find that policemen and firemen in municipalities do not hold their positions for a term, namely, for a fixed and definite period of time, and hence, that they are not subject to the provisions of Section 4213 of the General Code, denying the power to increase or diminish the salaries of officers, clerks or employes of a municipality during the term for which they were appointed or elected.

They are, therefore, entitled to a peremptory writ of mandamus as prayed for, which shall hereby issue, and judgment be entered accordingly.

ERROR TO THE MAYOR OF A VILLAGE IN TWO COUNTIES.

Common Pleas Court of Hamilton County.

HENRY THEOBALD V. STATE OF OHIO, AND FOUR OTHER CASES.

Decided, February, 1912.

Jurisdiction of a Mayor—Where the Town Lies in Two Counties—Prosecution of Error—Section 3539.

1. Inasmuch as the village of Milford is situated in both Hamilton and Clermont counties, the jurisdiction of its mayor is made, by Section 3539, General Code, co-extensive with both counties.
2. But where the offense was committed in Hamilton county, and the trial was held and judgment rendered at the situs of the village which is in Clermont county, the prosecution of error must be to the Common Pleas Court of Clermont County, and where such proceedings are filed in Hamilton county the court is without jurisdiction and the proceedings must be dismissed.

Gusweiler & Klein, for plaintiffs in error.

A. J. McNair, contra.

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These five proceedings are filed in this court, each involving the same questions and are error proceedings from a judgment of H. H. Hill, mayor of the village of Milford, Ohio. The above named plaintiffs in error were arrested upon warrants issued by the mayor of the village of Milford on or about September 20, 1911, charging each of them with a violation of Section 13047 of the General Code, prohibiting persons from engaging in the business of barbering on Sunday. The offense is a misdemeanor under said section and the penalty for a violation of the statute is a fine of not less than fifteen dollars for the first offense and for each subsequent offense not less than twenty dollars nor more than thirty dollars, or imprisonment in jail for not less than twenty days nor more than thirty days, or both. The affidavit upon which the warrant was based in each case sets out that the plaintiff in error is a resident of Hamilton county and that the offense was committed in Hamilton county, in the state of Ohio. The record in each case discloses that the plaintiff in error was apprehended under the warrant, brought before H. H. Hill, mayor of the village of Milford, and tried by him upon the charge at his office in the village of Milford in Clermont county, Ohio.

The village of Milford is situated partly in Hamilton county and partly in Clermont county. Its public offices are situated in Clermont county. The mayor's office is also there situated, and the cases were tried at that place.

By the provisions of Section 4536 of the General Code, the mayor of a village shall have final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is by the Constitution entitled to a trial by jury. His jurisdiction in such cases shall be co-extensive with the county.

Now, all of the cases at bar are misdemeanors in which only a fine can be and was imposed, because they are the first offenses charged; and none of the plaintiffs in error is entitled to a jury trial.

By the provisions of Section 11275 of the General Code, where the charter of a corporation created under the laws of the state

prescribe the place where suits must be brought, that provision shall govern. The village of Milford being located in two counties and the public offices being in Clermont county and not in Hamilton county, the situs of that village is in Clermont county. This was decided by our circuit court directly in the case of *C. & W. Turnpike Co. v. Milford*, 13 C.C.(N.S.), 170. See also, *Fostoria v. Fox*, 60 O. S., 340.

The jurisdiction of the mayor in villages in misdemeanor cases is confined to the county in which the municipality is located. But by the provisions of Section 3539 of the General Code, it is provided that when the jurisdiction of municipal officers is co-extensive with the county in which the corporation is situated, their jurisdiction in corporations embracing territory of more than one county shall be co-extensive with each of the counties in which any part of such territory is located. In other words, the village of Milford being located in two counties, the mayor thereof, although his office and the situs of the village is in Clermont county, has jurisdiction in misdemeanor cases, provided for in Section 4536 of the General Code, co-extensive with both Clermont and Hamilton counties. It would therefore appear that the mayor of the village of Milford had jurisdiction to issue a warrant and hear and determine the prosecution of a person charged with being guilty of a misdemeanor in Hamilton county, as these plaintiffs in error were charged and prosecuted.

Upon the trial before the mayor of the village of Milford, all of these plaintiffs in error were found guilty of the violation of the section of the statute heretofore cited, and each was adjudged to pay a fine of twenty-five dollars, and costs amounting to fifteen dollars and forty cents, and to stand committed to the Cincinnati Work House until the fine and costs were paid, or secured to be paid, or until they should be otherwise legally discharged.

To this judgment, each of the above plaintiffs in error excepted and filed his petition in error in this court, to reverse, and vacate and set aside the judgment.

By the provisions of Section 13751 of the General Code, the court of common pleas in criminal cases has jurisdiction to re-

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view a judgment or final order in a criminal case made by a court or officer inferior to the court of common pleas. In order to obtain such review of the judgment it is necessary to file a petition in error together with a transcript and a complete record of the docket entries made in the court below.

By the provisions of Section 13754, when the petition in error is filed in the court of common pleas, a summons shall issue thereon, directed to the sheriff of the county in which the judgment was rendered, containing a description of the judgment so as to identify it, reciting the fact that the petition in error has been filed, and commanding the sheriff to notify the prosecuting attorney of the county of the time when the petition in error will be for hearing, and if additional papers are required, the sheriff is commanded to notify the officer (in this case the mayor of Milford) in whose possession they are, to forward them to the court of common pleas.

In each of these cases the plaintiffs in error caused a summons to be issued and served upon the prosecuting attorney of Clermont county and also upon the mayor of the village of Milford, as required by law. A complete record of the proceedings before the mayor of the village of Milford is also brought up and filed in each of the cases and they were submitted to the court upon the arguments of counsel and voluminous briefs.

It appears therefore from the record in each one of these cases that these judgments were rendered in Clermont county; and inasmuch as the Court of Common Pleas of Hamilton County has no jurisdiction to hear and determine a proceeding in error to reverse, vacate or modify a judgment rendered outside of Hamilton county, it would seem that this court can not proceed to a determination of the merits of the controversy involved in any of these proceedings in error.

It was held in the case of *Railroad Company v. Hollenberger*, 76 O. S., 177, that where the court has no jurisdiction of the subject-matter of the suit, the proceedings should be dismissed at any stage of the case when that fact is made to appear. Now Hamilton county constitutes the first judicial district of the state of Ohio, and its jurisdiction to hear and determine cases ex-

tends only to cases, prosecutions and proceedings which arise in Hamilton county. A judgment by a mayor of an adjoining county can not be reviewed by the Court of Common Pleas of Hamilton County, but must be reviewed in the court of common pleas of the county in which the judgment was rendered. The fact that the village of Milford is located partly in Hamilton county, does not give the court of common pleas of this county jurisdiction to review a judgment of the mayor of that village, unless that judgment were rendered in Hamilton county. But as we have heretofore pointed out, the record shows that these judgments were rendered in Clermont county; that the situs of the village of Milford is in Clermont county under the decision of the circuit court above cited and the statute, and that all prosecutions for violations of ordinances and statutes must be heard and determined at the situs of the corporation in Clermont county.

It seems to me that the provisions of the General Code, Section 14754, which require a summons in error to be served upon the sheriff of the county in which the judgment is rendered in proceedings of this character, indicate clearly that the Legislature contemplated and intended that the prosecuting attorney of the county in which the judgment was rendered should look after the interests of the state in proceedings in error of this character. While the Constitution does not directly limit the jurisdiction of the court of common pleas to review judgments within the territorial limits of the county or districts, nevertheless, it is unquestioned that its jurisdiction does not extend beyond the district which is co-extensive with the county, as far as Hamilton county is concerned.

I am therefore of the opinion that this court should not pass upon the merits of the controversies involved in these proceedings in error, but that error should be prosecuted, if it is desired, by the plaintiffs in error to the Court of Common Pleas of Clermont County.

Because of the lack of jurisdiction to hear and determine them, it is the judgment of this court that the petitions in error be dismissed or stricken from the files.

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State v. Woolard et al.

ADMISSION TO BAIL IN FIRST DEGREE MURDER CASES.

Common Pleas Court of Licking County.

STATE OF OHIO V. EDWARD WOOLARD ET AL; AND STATE OF OHIO
V. ART DOVER ET AL.

Decided, September Term, 1910.

Bail—Constitutional Rights with Reference to—Discretion of the Court—How Exercised—Where the Defendant is Charged with Murder in the First Degree—Presumption of Guilt—Burden of Proof—Defenses—Evidence Before the Grand Jury—Alibi in Rioting and Lynching Cases.

1. Under the constitutional provision that "all persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great," an application for bail by one who is under indictment for murder in the first degree is addressed to the sound legal discretion of the court, with the presumption against admission to bail, and the burden upon the applicant of showing that the proof is not evident or the presumption of guilt great.
2. That the accused has been three months in jail, that the grand jury in indicting him acted upon insufficient evidence, or that there are matters of defense, are not considerations which will move a court to grant an application for bail, when the charge is murder in the first degree; and where the charge is based upon alleged participation in rioting or a lynching, the defense of an alibi, even if established beyond peradventure, could not be considered.

Phil B. Smythe, Prosecuting Attorney, and *Wm. H. Miller*, Assistant Attorney-General, for the state.

Kibler & Montgomery, *J. R. Fitzgibbon*, *Frank A. Bolton* and *Jones & Jones*, contra.

NICHOLAS, J.

The defendants in those two cases—some twenty-five of them in number—were indicted by a special grand jury, impaneled in July last, of the crime of murder in the first degree, a capital offense in this state. All are now confined in the county jail, and five of them, to-wit, Art Dover, Edward Woolard, Lewis Bolton, Clarence Mulligan and Frank Graef, have filed applications to be admitted to bail, under a claim of constitutional right or privilege, our Constitution providing (Section 9 of Ar-

ticle I) that "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident, or the presumption great."

Before beginning an investigation of the proof, or of the presumptions arising therefrom, in the individual cases, let us inquire what principles of law must govern this inquiry.

Our Supreme Court has said, as early as the case of *Summons v. State*, reported in 19 Ohio, at page 139, that this is a question addressed to the sound legal discretion of the court.

And again, the same court, in the case of *Kendell v. Tarbell, Judge*, reported in the 24 Ohio State, at page 196, say:

"The indictment raises the presumption required by the Constitution to justify the refusal of bail."

Now, referring back again to the case in the 19 Ohio, we find this language:

"A safe rule, where a malicious homicide is charged, is to *refuse bail in all cases* where a judge would sustain a capital conviction, if pronounced by a jury, on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail; and instances where the evidence for the state is of less efficacy, to admit to bail. So if the evidence exhibited on the hearing of the application to admit to bail be of so weak a character that it would not sustain a verdict of guilty against a motion for a new trial, the court will feel it their duty, under the Constitution, to adjudge the prisoner 'bailable by sufficient sureties.'"

Guided by these authorities, which I understand speak the present law of this state on the subject, we learn:

1st. That this question is addressed to the sound, legal discretion of the court;

2d. That the fact of an indictment raises the presumption required by the Constitution to justify the refusal of bail, or in other words places the burden upon the defendant of showing that the proof is not evident, nor the presumption of his guilt great; and

3d. That the court must deny the application for bail unless he would set aside a conviction upon the showing made on this motion.

With these principles of law in mind, let us examine the individual cases.

First, the case of Lewis Bolten: The application in this case does not raise the constitutional question I have been discussing, but I will do it *sua sponte*, that he may have the advantage of it; but, before doing so, I will dispose of his motion as it is.

The grounds upon which he asks to be admitted to bail are six in number. The first is:

That he has been in jail for three months, and his case has not yet been set for trial. I have never seen, and counsel have not called my attention to, an authority recognizing this as a ground for bail in a capital case.

2d. That he was indicted at the April term of this court. Counsel will hardly urge this as a ground.

3d. That he is not guilty of the offense of which he stands charged. This is not a question for the court, but must be submitted to a jury.

4th. That there was not sufficient evidence before the grand jury to warrant their returning an indictment against him. Could this be a ground for admission to bail if it were true? In disposing of this question, I shall treat it as though it raised the constitutional question sought to be raised in the case.

Thompson and Merriam, in their most excellent work on juries, at page 651, in treating of the relationship of the court and grand jury, say:

“In certain respects, the grand jury is to be regarded as enjoying a distinct autonomy. After they have been organized the larger part of their legitimate functions is to be performed by them as a separate and independent body acting by themselves, apart from the court; and in their deliberations and actions they are subject to no control or direction other than that which they may receive in the charge of the court before they proceed to enter upon their duties. The court neither keeps their consciences nor can compel them in finding facts. Within the sphere of their duties their power may properly be said to be omnipotent.”

And again, on page 365, these authors say:

“When the indictment has been duly returned, and the finding is endorsed, as required by law, these facts are considered as conclusive of the regularity of the finding.”

Our own Supreme Court, in *Turk v. State*, 7 Ohio, part 2d, page 240, say:

"Inquiry can not be made upon what *ground* any of the twelve jurors concurred in the finding."

And as a grand juror is not permitted to impeach the finding of a grand jury, and no one else may invade the secrecy of that body, how could this court institute any such an inquiry as this branch of the motion would require? In the last above cited case, at page 243, the court say:

"So far as the facts are concerned, the grand jury is an independent branch of the criminal tribunals of the country, and the court can not be permitted to substitute its own discretion or judgment for that of the grand jury upon the sufficiency of testimony."

While considering this question, we must not forget that grand juries may return indictments based wholly upon facts within their own knowledge, and to support which not a single witness has been called or sworn.

The taking of extended notes of the evidence produced before a grand jury is of recent origin, for it is but recently that a stenographer could be admitted to the grand jury room. Consequently, this question is a novel one, and it would be with great hesitancy that I would attempt to establish a precedent. I am not prepared to say that under no circumstances should a trial court look into the testimony taken by a grand jury, but I do feel prepared to say that, under the authorities which I have cited, in our state, I am not justified in looking into the evidence in those cases to see if the grand jury was justified in returning the bills of indictment. If I can not, in the language of the 7th Ohio, quoted, inquire into what ground any of the twelve jurors concurred in finding the indictments, I certainly can not inquire into what ground all twelve of them concurred. This same authority holds that the court can not substitute its discretion and judgment for that of the grand jury upon the sufficiency of the testimony. In passing upon the question of whether or not a bill of indictment shall be returned, it is the duty of the grand jury to so return if the guilt of the defendant is established beyond a reasonable doubt. The presumption of law is that the grand jury did its duty; that is, obeyed

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the instructions of the court, and acted in conformity with their oath; and if they did so (and nothing appears in this record to the contrary) how can this court say that the proof is not evident or the presumption not great?

5th. That there is no reasonable probability of a trial of this case at the present term of this court.

6th. That he offers bond in any reasonable amount.

If the defendant has no constitutional right to be admitted to bond, I hardly think counsel would insist upon substituting either or both of these grounds in its stead.

In support of this motion, he presents the record of the grand jury, and some sixteen affidavits, including his own. As to the record of the grand jury, I have said all that I care to upon this subject, and do not believe that multiplying words will make any clearer my position than I have already done.

These affidavits are all to the effect that this defendant was not with the crowd that hung Etherington, but was at his place of business some distance away. In other words, their tendency is to establish what is known in the law as the defense of an *alibi*. Assuming them to be true, do they establish this defense? The principle that whoever takes part in or incites others to acts of violence, under such circumstances as those of July 8th, is equally guilty with those who do the violent acts, is too fundamental or elementary to require citation or illustration. So that if this defendant incited others, either by words or deed, to commit this act, then it would not matter how far away he was from the scene of the trouble at the moment of its enactment. In most cases, the defense of *alibi*, though scrutinized with care by the courts, when established is a complete defense; but not so in this class of cases. It is a well established principle—and so far as this court has been able to learn it is universally recognized—that whoever takes part in a riotous assemblage, or incites others to do so, is responsible for any offense which is the natural or logical result of such misconduct. So that this evidence does not in anywise negative the idea that this defendant did incite or aid in inciting this mob to the violence which resulted in Etherington's death; and hence does not negative the conclusion that it was for this act that the grand jury charged him with this offense.

The defendant having failed, therefore, in overcoming the presumption raised by the finding of the indictment by the grand jury, this application is denied.

In the application of Dover, the constitutional question is squarely raised. In support of this application, the defendant offers the evidence taken before the grand jury; and his counsel, in his brief, says that there is evidence that just after supper on July 8th, and a long time before the jail was broken into, this defendant said, "I am an Eagle; let's get him."

But he does not claim that the mob that afterwards took Etherington's life was not at that time formed, and did not continue its activity from that time until the death of Etherington. If this were true, and the declaration that this defendant incited others to the acts of violence that resulted in Etherington's death, can this court say that the proof is not evident or the presumption of his guilt not great?

What I have said in reference to the grand jury record applies, of course, to this case as to the Bolton case. In this case, as in the Bolton case, the defendant fails to rebut the presumption raised by the finding of the indictment; and the application is, therefore, denied.

In the application of Edward Woolard, the defendant raises the constitutional question also, and offers the record before the grand jury, and the affidavits of himself and six others. By these affidavits, he seeks to show that although in the jail at the time that Etherington was taken from his cell, he took no part in doing so, but did protect an officer of the law who was then protecting the prisoner. This is a defense for the consideration of the jury, but does not rebut the presumption already referred to, and this application is denied.

In the application of Clarence Mulligan, the constitutional question will be considered, though not formally presented. He offers the grand jury record and five affidavits, including his own. These affidavits are to the effect that he was at the saloon of the deceased, Howard, at the time it is claimed that Etherington lost his life; and the defendant adds: That he did not aid in that offense in any way. This is a question for the jury, and not for the court, and this application will be denied for the reasons already stated.

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**CONSTITUTIONALITY OF ACT PROTECTING MEMBERS OF
LABOR UNIONS FROM DISCHARGE.**

Common Pleas Court of Hamilton County.

IN RE SAUL BERGER AND IN RE WILLIAM SKAHN, HABEAS
CORPUS.

Decided, January 9, 1912.

Violations of Personal Rights—Interference with Membership in a Labor Organization—Constitutionality of Ohio Act Providing a Penalty Therefor—Right of Employer to Refuse Business Relations with Any Persons Whomsoever—Not Interfered with by Protection to Employee in His Right to Belong to a Labor Union—Motive of Discharge of Employee Determines Quality of Act.

Section 12943, General Code, which subjects an employer or his agent to criminal prosecution for preventing employees from joining or belonging to a lawful labor organization, or for coercing or attempting to coerce by discharging or attempting to discharge them because of their connection with such organization, is not in contravention with constitutional guaranties, but is a valid exercise of legislative power.

Morse & Tuttle, for petitioners.

Nicholas Klein, contra.

GORMAN, J.

The above two causes are identically the same except the names of the persons on whose behalf the writs of habeas corpus are sued out, and the numbers of the cases. They will therefore be considered and determined as one case, as the same facts and principles of law are common to both.

On the 15th day of December, 1911, each of the petitioners above named, Saul Berger and William Skahn, were arrested upon warrants issued by James S. Myers, a justice of the peace of Cincinnati township, based upon affidavits charging each of them with a violation of Section 12943 of the General Code of Ohio, in that on or about December 2d, 1911, William Skahn did unlawfully discharge and coerce one Wilfred Garand, who was then and there an employee of the MacDonald & Kiley Com-

pany, an Ohio corporation, from the employment of the said the MacDonald & Kiley Company, knowing that the said Garand was then and there a member of and in connection with the United Shoe Workers of America, Local 26, Cincinnati, Ohio, a labor organization, and that on or about December 2d, 1911, Saul Berger did unlawfully discharge and coerce Edward Schroeder, an employe of the Roth Shoe Manufacturing Company from the employment of said company, knowing that the said Schroeder was then and there a member of and in connection with the United Shoe Workers of America, a lawful labor organization. Each of the petitioners were apprehended under and by virtue of said warrants on the 15th day of December, 1911, by Philip Tiernan, a constable of this township, and immediately each of said petitioners sued out a writ of *habeas corpus* under the above entitled causes and numbers, alleging in each of their said petitions that each one is illegally restrained and deprived of his liberty without any legal authority, by Philip Tiernan, constable of Cincinnati township, Hamilton county, Ohio; and praying that upon a hearing thereof, each may be discharged from such illegal restraint. The writ was made returnable forthwith.

The constable, Philip Tiernan, answered the petition justifying his arrest and detention of the petitioners under and by virtue of the warrants aforesaid, and attached to his answer and made part thereof the affidavit and warrant in each case; and he prays that the writs issued be dismissed and that the petitioners be returned to his custody and charge.

To the answer in each case the petitioner has demurred on the grounds that the facts therein set forth are not sufficient in law, and for the further reason that the warrants as set forth in said answers are unlawful and in contravention of the Fifth Amendment to the Constitution of the United States; of the Fourteenth Amendment to the Constitution of the United States; of Section 1, Article I of the Constitution of the state of Ohio; and of Section 26, Article II of the Constitution of the state of Ohio; and that said warrants are based upon complaints under a statute in contravention of the provisions aforesaid and are void.

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The case was fully and ably argued by counsel for the petitioners and for the answering officer, and briefs were submitted on December 23, 1911.

The sole question raised by the demurrer is whether or not Section 12943, General Code (89 Ohio Laws, p. 269, Section 1), is a valid law, or unconstitutional and in contravention of any provision of the Constitution of the United States or of the Ohio Constitution.

Section 12943, General Code of Ohio, under which the warrants were issued in this case, and the validity of which is questioned by the petitioners, was passed by the Legislature in 1892, and reads as follows:

“Whoever, being a member of a firm, or agent, officer or employe of a company, corporation or person, prevents employes from forming, joining or belonging to a lawful labor organization, or coerces or attempts to coerce employes, by discharging or threatening to discharge them from their employ, or the employ of a firm, company or corporation, because of their connection with such labor organization, shall be fined not more than one hundred dollars or imprisoned not more than six months or both.”

For the purpose of these habeas corpus cases, the demurrers admit that the petitioners have violated the provisions of this law: but they seek to avoid the penalty involved in its violation by pleading the invalidity and nullity of the law. In other words, the petitioners claim that the Legislature of Ohio had no power or authority to enact this law, because it, the Legislature, is prohibited by the Constitution of the United States and the Constitution of Ohio from making, passing or enacting laws of the kind and character of Section 12943, General Code. The specific provisions of these constitutions, or parts thereof, which it is claimed are contravened and violated by this enactment are the following:

The Fifth Amendment of the Constitution of the United States which reads in part as follows:

“No person * * * shall be deprived of life, liberty, or property without due process of law.”

The Fourteenth Amendment of the Constitution of the United States which reads in part as follows:

“* * * Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Article I, Section 1, of the Constitution of Ohio reads as follows:

“All men are by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.”

Article II, Section 26 of the Ohio Constitution reads in part as follows:

“All laws, of a general nature, shall have a uniform operation throughout the state.” * * *

It is not believed that the law can be claimed to be invalid unless it does contravene one or more of these provisions of these constitutions.

Under our form of government we have as the fundamental law of the nation, a Constitution of the United States, the underlying law adopted by the people of this union, and wherein and whereby the people have defined and limited the powers of their own government, and the branches thereof—the legislative, executive and judicial. Certain things are therein prohibited to be done either by Congress or by any state of the union; and the purpose of these inhibitions is said to be to protect and secure the natural and inalienable rights of the weaker, or minorities, from the aggressions or oppressions of the strong, or the majorities; to prevent a tyrannical majority from overriding the minority and depriving this minority of its natural rights. Were it not for the desire of the people to protect the weak minority from the tendency of majorities to impose the rule of their will upon the minority regardless of the justness or equity of the rule, and the further desire of all the people to limit the powers of their officials and public servants, there would be no necessity or occasion for written constitutions. All the

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states of this Union have constitutions in the main similar to the Federal Constitution, adopted by the people of the several states, and for the same reasons that prompted all the people of the United States to adopt a Constitution. Among the provisions of the federal Constitution and the Ohio Constitution are those above cited which are drawn in question in this case.

Now, the power to determine whether or not any specific provision of the federal or state Constitution has been violated or contravened by any of the departments of government—the legislative, the executive or the judicial—must and should be lodged somewhere; otherwise, there could be no security to the people of their rights under their fundamental law. Majorities electing legislatures could secure the passage of laws so obnoxious to all sense of justice and so violative of all natural rights as to render the government odious in the eyes of all fair minded persons. Executive officers might arbitrarily exceed all the powers granted to them by the Constitution, and impose their autocratic will, under the guise of law enforcement, upon a helpless people. Judges, in the exercise of their functions, might exceed their powers and jurisdictions as defined by the Constitutions, were their decisions not subject to review and the powers and jurisdiction which they may exercise, subject to be questioned by other judges and other courts. So it is that the acts and proceedings of all three branches of our government should be and are subject to inquiry as to the right to exercise the powers, functions and prerogatives which from time to time they do exercise. It has been thought wise and proper to lodge in our courts the power and authority of determining in any given case whether or not there has been a usurpation of power by any branch of the government, and especially whether or not the legislative branch thereof has exceeded its authority under the Constitution in the enactment of any law. As to the wisdom of this grant of power to the courts we are not now to discuss or consider. If this power is to be exercised by any tribunal—and it would seem that it should be—there is probably no better lodgment place for the exercise thereof than in our courts. The judges are supposed to be, and generally are, learned in the law; and by education and

training, study and experience are undoubtedly better qualified to pass judgment upon the validity of a law, of the Legislature, an act of an executive officer, or a judicial decision, than any other class or group of men. However this may be, this power is lodged with the courts and it becomes their duty to exercise it, whenever called upon in a proper case and in the proper manner, and to render a fair and impartial decision under their oaths of office and to the best of their abilities.

The question, therefore, presented in this case—and the sole question as has been heretofore said—is whether or not this act of the Ohio Legislature, passed in 1892, contravenes any of the provisions of the federal or state constitutions; and that question is submitted to this court in this case for determination.

It seems to be well settled that the question can be raised in a habeas corpus proceeding as well as on error to a criminal prosecution. See, *Ex parte Edward Kline*, 6 C. C., 215; *Ex parte Siebold*, 100 U. S., 176.

The validity or constitutionality of this enactment has never been passed upon by the Supreme Court of this state, or by any circuit court, but there are two decisions of the courts of common pleas of this state directly in point; one by Judge John R. Sayler, formerly a judge of this court, and one by Judge Pugsley of the Lucas County Common Pleas, each of whom reached diametrically opposite conclusions as to the constitutionality of the section.

In the case of *Davis v. State*, 30 Bulltein, 342, Judge Sayler held the law constitutional after an able presentation of the law by such distinguished counsel as Judge Hiram D. Peck on behalf of the validity of the law, and Senator Joseph B. Foraker against the proposition. The case was taken on error to the circuit court of this county, but when called for argument, Davis who was contending for the validity of the law, failed to appear and the proceeding was dismissed in that court for want of prosecution.

In the case of *State v. Bateman*, 7 Nisi Prius, 487, decided after Judge Sayler's decision was rendered, Judge Pugsley, sitting on the Lucas county common pleas bench, held the law to be unconstitutional.

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Both of these judges were of high standing with the bench and bar of this state, and their decisions are carefully considered and numerous authorities cited to support their respective conclusions.

Outside of this state laws similar to or almost identical with our Section 12943, General Code, have been construed by several courts in the following cases:

In *Coffeyville Co. v. Perry*, 69 Kan., 297, a statute almost word for word like ours was under consideration by the Supreme Court of Kansas, and it was there held that the law did not fall under the police power because it did not affect the public welfare, health, safety or morals of the community; and that inasmuch as the law interfered with the right to terminate a contract, it was in contravention of that provision of the federal Constitution, which guarantees to every citizen the protection of life, liberty and property, and therefore null and void.

In *People v. Marcus*, 185 N. Y., 257, a law similar to the statute under consideration, was held unconstitutional because in contravention of those organic provisions of the federal and state constitutions which guarantee that no person shall be deprived of life, liberty or property without due process of law, and that the law unduly restricted the right of contract of the persons at whom the law was aimed. Judge Bartlett, however, in this case, dissented from the finding of the majority of the court and held the law to be a valid exercise of the police power on the part of the Legislature.

In the case of *State v. Julow*, 129 Mo., 163, the Supreme Court of Missouri held a similar law unconstitutional because it was in contravention of the constitutional guarantee that no person shall be deprived of life, liberty, or property without due process of law; and that the enactment of the statute was not a valid exercise of the police power.

To the same effect are the cases of *Gillespie v. State*, 188 Ill., 176; *State v. Kuertzberg*, 114 Wis., 530; *Matthews v. People*, 202 Ill., 389.

A similar law passed by Congress was up for construction in the Circuit and Supreme Courts of the United States in the case of *Adair v. the United States*, 152 Fed. Rep., 737, same case 208

U. S., 161. The case arose on the arrest of one Adair, an agent of a railroad company in eastern Kentucky, charged with the violation of Section 10 of the act of Congress passed June 1, 1898, making it a criminal offense punishable by fine for any employing common carrier doing an interstate business and subject to the provisions of the act, or any officer or agent thereof to threaten any employe with loss of employment or unjustly discriminate against any employe because of his membership in a labor organization. A demurrer was filed to an indictment against Adair as an agent of the railroad company, charging him with having violated this law by discharging an employe named Coppage because of his membership in a labor organization. Judge Cochran, in a very exhaustive and able decision reported in 152 Federal Reporter, held the section of the law and the entire act to be constitutional. On appeal by Adair to the Supreme Court, reported in 208 U. S., 161, that tribunal reversed Judge Cochran by a divided court of six to two, Justice Moody not sitting. The opinion of the majority was announced by Justice Harlan, in the course of which among other things, he said:

"The first inquiry is whether the part of the tenth section of the act of 1898 upon which the first count of the indictment was based is repugnant to the Fifth Amendment of the Constitution (of the United States) declaring that no person shall be deprived of liberty or property without due process of law. In our opinion, that section, in the particular mentioned, is an invasion of the personal liberty as well as the right of property guaranteed by that amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor; such right, however, being subject to the fundamental condition that no contract, whatever its subject-matter, can be sustained, which the law upon reasonable grounds forbids as inconsistent with public interests or hurtful to the public order, or detrimental to the common good."

And further along the court says:

"Mr. Cooley in his treatise on Torts, page 278, well says:

"It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim,

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caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others he is entitled to redress."

And further along Justice Harlan uses this language:

"The right of a person to sell his labor upon such terms as he deems proper, is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employe to quit the service of the employer for whatever reason is the same as the right of the employer for whatever reason, to dispense with the services of such employe. It was the legal right of the defendant, Adair, however unwise such course might have been, to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so, however unwise such course on his part might have been, to quit the service in which he was engaged because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employe has equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land."

Justice McKenna in his dissenting opinion, after discussing the question of whether or not Congress might pass the law under consideration in the exercise of its power to regulate interstate commerce, says as to the validity of Section 10 of the act involved, among other things on page 185 of this report:

"We are told that labor associations are to be commended. May not Congress then recognize their existence; yes, and recognize their power as conditions to be counted with in framing legislation? Of what use would it be to attempt to bring bodies of men to agreement and compromise, if you put out of view the influences which move them or the fellowship which binds them—maybe controls and impels them—whether rightfully or wrongfully to make the cause of one the cause of all?"

In the opinion of Justice McKenna, the law under consideration including section ten of the act which prohibited the employer from coercing the employe by threatening to discharge

him, or by discharging him because of his connection with a lawful labor union, was a valid law and contravened no provision of the federal Constitution. Justice Holmes also in a strong dissenting opinion concurred with Justice McKenna as to the constitutionality of the law. In the course of his opinion, he says:

"The section (Section 10) is, in substance, a very limited interference, with freedom to contract; no more. It does not require the carriers to employ any one. It does not forbid them to refuse to employ any one, for any reason they deem good, even where the notion of a choice of persons is a fiction and wholesale employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed. I hardly can suppose that the grounds on which a contract may lawfully be made to end are less open to regulation than other terms. So, I turn to the general question whether the employment can be regulated at all. I confess that I think that the right to make contracts at will that has been derived from the word liberty in the amendments has been stretched to the extreme by the decisions; but they agree that sometimes the right may be restrained. Where there is, or generally is believed to be, an important ground of public policy for restraint, the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued. It can not be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, might be deemed by Congress an important point of policy, and I think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along. But suppose the only effect really were to tend to bring about a complete unionizing of such railroad laborers as Congress can deal with; I think that object alone would justify the act. I quite agree that the question what and how much good labor unions do, is one on which intelligent people may differ. I think that laboring men sometimes attribute to them advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind—but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large."

In short, Justice Holmes appears to hold that the legislative body of Congress was not exceeding its authority in passing this

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law, upon the theory that it might conduce to the general welfare.

Now, there can be no doubt that, to the extent that this Ohio statute undertakes to prescribe the lengths that the employer may go in dictating to his employe the terms and conditions upon which he may remain in his employ, it is a limited interference with the freedom to contract.

It seems to be conceded by all courts that have passed upon legislation of the character of Section 12943, General Code, that if there exists power and authority to enact it, under the federal and state constitutions, in view of their provisions looking to the guaranteeing of the natural rights of the citizens, it must be under the police power of the state. No court has ever yet specifically defined this power, or fixed the limits beyond which the state may go in its exercise. Justice Harlan in the *Adair* case, 208 U. S., at page 173, in speaking of this power, says:

“There are, however, certain powers existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without at present any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.”

It therefore becomes a question in each case where the natural liberty of the citizen, guaranteed by the Constitution, is limited or interfered with, whether or not the public safety, health, morals or general welfare are advanced or promoted by the legislation affecting the liberty of the citizen. If I am to decide this case on precedent alone, then by the overwhelming weight of authority I must decide the law unconstitutional. notwithstanding the decision of Judge Sayler in the case above cited and the decision of Judge Cochran in the *Adair* case, and the able dissenting opinions herein referred to. In the absence of any authoritative decision of our Supreme Court or circuit court, I am at liberty to follow the decision of Judge Pugsley or Judge Sayler, or I may disregard either or both, perhaps, and decide the case on

reason and principle. . There is more reason for following a decision of a former judge of this court than for following one of another common pleas judge of this state outside of this county. Laws similar to our Section 12943, General Code, have been enacted in New York, New Jersey, Pennsylvania, Indiana, Illinois, Missouri, Wisconsin, Minnesota, Colorado and California, and perhaps in other states. When directly brought in question these laws have been held unconstitutional in Illinois, Kansas, Missouri and Wisconsin. If they have been passed upon by any of the courts of the other states, except the two common pleas decisions in Ohio heretofore cited, I have been unable to find the decisions.

Now, generally speaking, the grounds of these decisions are that the law violates one or more of the federal or state constitutions by interfering with the liberty of contract, or are special legislation not having a uniform operation; that they have the effect of punishing the employer for discharging his employes, when he has a natural inherent right to hire or discharge whom he pleases, without being obliged to give any reason for his conduct, or for mere caprice, whim or malice if he pleases, and regardless of the injury which may be inflicted on the employe by reason of his discharge, provided he is employed at the will of the employer.

But the question also arises in this case, as it may have arisen in other similar cases, may not and does not this law respect and recognize this right of the employer—which it must be conceded he has—and nevertheless protect the employe's right to belong to his association or union free from interference, coercion, or intimidation by his employer?

The employe's property is labor. This is what he has to sell, and he should be allowed as great freedom as possible for the purpose of selling it for the highest price he can legally obtain therefor, either singly or in combination with his fellow laborers. It is almost impossible in this age of modern complicated machinery and combination of capital, for a laborer to secure, by himself, fair terms from the employer; hence the necessity for labor unions to enable the workingmen to combine and deal with their employers jointly as one man, thereby securing better terms

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and prices for their labor. While it may be the motto of the large employer of labor to "divide and conquer" it is also the battle cry of the laborer to "unite or be conquered." Labor unions are recognized in all states and by the federal government as lawful organizations, to promote and advance the material, intellectual and moral welfare of their members. Now, although these unions have a strong influence upon the relation of employe and employer, they are not in reality a part of it. If these unions are recognized by the law as lawful agencies for the promotion of the well-being of the laborers, may not the state protect them against attempts to disrupt them and break them up by the use of force, violence, coercion, intimidation, threats and methods and means not recognized as legal? Can it be doubted that the state has the right to protect the property and liberties of the employer against coercion, threats and violence from the employes? A threat of a discharge of an employe may or may not be justifiable, depending upon the motive, intent or purpose with which it is made. No one has a legal right to coerce or intimidate another into doing or not doing against his will, a legal or an illegal act. If the threat to discharge an employe is made, not for the purpose of subserving the employer's interests or business, but for the sole purpose of coercing the employe into doing something not connected with the employer's business, but entirely aside from it, it can not be claimed, I think, to stand on the same basis as the discharge or threat in furtherance of the employer's business. In the one case it is intimidation; in the other it is not.

In *Freund on Police Powers*, Section 326, it is said:

"While the employer can not be forbidden to protect himself against hostile unions, an attempt on his part to coerce the laborer to keep away or withdraw from 'any union,' if understood as meaning any union whatsoever, may be treated as exceeding the measure of legitimate self defense. Gross forms of intimidation may, of course, be absolutely forbidden."

We have many examples of the exercise of the powers of the state through legislation to protect and secure to the citizens their rights from coercion, intimidation and wrongful interference. We have on the Ohio statutes, laws prohibiting employers

from coercing their employes into buying goods from themselves or others, Section 12944; prohibiting an employer from threatening an employe with discharge for not signing a local option petition, Section 12948; prohibiting an employer from threatening to discharge an employe because he fails or refuses to labor on election day between the hours of 5:30 A. M. and 9 A. M., Sections 12949-12951; prohibiting life insurance companies from discriminating against colored persons, Sections 12954-12955; prohibiting inns, hotels, restaurants, etc., from discriminating against colored persons.

There are laws which limit our freedom of action, right to contract, our mode of living, our freedom of speech, and we can scarcely be said to have one single natural right that is not hampered, limited or curtailed by the state. We are required to support our parents if they be indigent. Trains carrying passengers must carry a crew of not less than five persons. Safety couplers and brakes must be attached to locomotives and cars. No man is allowed to work alone in a coal mine. Tenement buildings must be constructed according to certain plans and designs and be equipped with fire escapes. Partition fences can not be of hedges or barbed wire. Our food must all be up to the standard. There are a thousand and one ways in which the citizen is required to conform his conduct or so use his property, rights, and liberty as not to interfere with or injuriously affect the property, liberty, rights and freedom of his fellow citizen. Under our form of government there is no such thing as absolute rights. Our rights are all qualified and limited; and we must more and more, as the problems of life become more complicated and the struggle for existence becomes sharper, submit to a further curtailment of our natural rights in order to promote the general welfare and advance the common weal.

Now, it appears to me that the construction placed upon this Section 12943 by Judge Sayler is just as reasonable as the construction of Judge Pugsley and the other courts who decided as he did. I think this statute can be so interpreted as to hold it constitutional and still not unreasonably infringe upon the employer's rights to protect and defend himself and his interests. It leaves him the full right to select his own employes and apply

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any test he may desire when he employs them; it leaves him free to discharge them with or without a reason, for a mere whim or caprice; but it prevents him from using his superior strength of position to attack and suppress the legal rights of his employes, which the law recognizes as essential to their welfare and the health, existence and happiness of the laborers and their families. It is in the interest of the peace, health, happiness, comfort and morals of the workingmen and their families that the bread winner be constantly employed at the highest wages that he can command for his labor, and to that end the states of this Union and the federal government have recognized and do now recognize the legality and importance of laboring men maintaining efficient unions through which, in the warfare or struggle with capital, the laborers may act in unison as one man for their mutual benefit and welfare.

Now may not the state enact a law to protect this association against improper and illegal attacks that may be made upon it? If the employer were to place a pistol at the heads of his employes and threaten them if they refused to withdraw from their union, would any one say that this act was not a coercion on the part of the employer? When a workingman is absolutely dependent upon his labor and his job for his living and his family's living, can any one doubt that a threat to discharge him if he does not withdraw from his union is a coercion? Theoretically, it may be said that the employer may discharge him without a reason or for a reason which he may keep to himself, and the consequences to him are the same. But this law, as I interpret it, is to protect the union, a lawful organization, and a threat or coercion against a member of the union to compel him to withdraw therefrom may be made unlawful, just as threats, intimidations and coercions against church members to do them harm if they do not withdraw from their church may be made a misdemeanor or a crime. It is contrary to public policy to permit any one to be forced, coerced, or intimidated by another to do or not to do a thing. As Judge Sayler has put it in the Davis case above cited:

"I think the Legislature has the power to enact that the coercion of one person by another may be an offense."

And again, in speaking of the effect of this law upon the employer, he says:

"I do not think this takes away from the employer the right to discharge him for any reason, but he shall not attempt to coerce him to quit the labor organization."

It seems to me that the Legislature has here undertaken to make an offense of that which would not be an offense, except for the motive or intent with which the act is done. There are many cases in which a person may be liable for doing an otherwise lawful and proper thing, if it is done with an evil intent, or a malicious motive. A person takes my horse from my stable and rides away on him. Now the character of this act in law depends upon the motive or intention of that person at the time he took the horse. If I had before that time given him permission to take the horse, he has committed no wrong. If I had not given him permission, but he had had the horse before that time to do an errand and he took him on this day for the same purpose but without my consent, he would be liable to me civilly for the use of the horse and any injury done to him. If, however, he took him without my knowledge or consent, but with the intention to take and keep the horse as his own, he would be liable for the theft of the horse and guilty of a crime.

If the employer discharges the laborer or threatens to discharge him from his employ, not for the purpose of benefitting him or his business, but with the sole intent or motive of coercing or intimidating the employe into withdrawing from his labor organization, is he not acting from bad and malicious motives with a wicked intent to injure the labor organization by breaking it up or attempting to break it up? Under this statute, as I read it, the employer may be chargeable with an offense although he does not actually discharge the employe. The threat to discharge him because of his connection with the labor organization is the coercion defined by the statute, and whether the employe withdraws from the labor organization, or whether the employer discharges him in fact, the offense has been committed. It seems to me that Judge Pugsley has missed the point to this statute when he says that:

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"To constitute the offense a discharge or threat to discharge for the reason stated must be shown."

And this he says the employer may do.

The following cases hold that an act lawful in itself may be unlawful if done maliciously or in an unlawful manner. *Keeble v. Heckeringill*, reported in a note to *Carrington v. Taylor*, 11 East, 573, where the defendant was held liable for damages in tort, for firing off his gun in the air—a perfectly lawful act—with malicious intent to scare away wild fowl from the plaintiff's decoy. The same principle was adopted in *Carrington v. Taylor*, *supra*. In *Bowen v. Hall*, 6 Q. B. D., 333, the same principle was recognized and adopted. See, also, *Lumley v. Lye*, 2 Ellis & Bl., 216; *Mogul Steamship Co. v. McGregor, G. & Co.*, 21 Q. B. D., 544; *People v. North River Sugar Refining Co.*, 7 N. Y. Sup., 406; *Walker v. Cronin*, 107 Mass., 555; *Moore & Co. v. Bricklayers Union*, 33 Bull., 48.

A very interesting and exhaustive article in point by Professor Jeremiah Smith, with numerous citations, will be found in 20th *Harvard Law Review*, pp. 251 to 279 inclusive, under the title of "Crucial Issues in Labor Litigation." In this article he says on page 273:

"It will be said that a man has the absolute right to threaten to do that which he has a right to do. Granted that what you may absolutely do you may absolutely threaten to do (give unqualified notice of your intention to do). But it does not follow that you may conditionally threaten to do it."

In this connection, it will be interesting and profitable to read the following cases on this point, as to how far one may be legally liable for maliciously doing an act which he has the absolute right to do. *Allen v. Flood et al* (1898), A. C., 1; *Knowlton v. Berry*, 188 Mass., 353; *Quinn v. Leathern* (1901), Law Rep. Appeal Cases, 495.

The rule laid down in these cases does not apply to acts which a man does on his own land, as for instance, erecting a spite fence. See *Letts v. Kessler*, 54 O. S., 73; *Barclay v. Abraham*, 121 Ia., 619.

It has been held in several cases that the members of a trade union have no right to strike for the purpose of coercing the em-

ployer to do a thing against his will, although the right to strike for their own benefit and to advance their own interests has been generally held to be legal. See following: *Folsom v. Lewis*, 208 Mass., 336; *Schlang v. Ladies Waist Makers Union*, 67 Miscel. (N. Y.), 221; *Kemp v. Division No. 241 Amalgamated Assn. of St. & Elec. Ry. Employes*, 153 Ill. App., 344; *Irving v. Joint Dist. Council U. B. of C.*, 180 Fed. Rep., 896; *O'Brien v. People*, 216 Ill., 354.

It would seem to be as fair to hold the employer to the same rule as the employe is held in the above cases. And if this act, although ordinarily an absolute right, be done from motives of unmixed malice, as the term is employed, gives rise to an action for damages as for a tort, why may not the Legislature under the police power make the act also a misdemeanor or a crime in furtherance of the public good and general welfare.

This limitation upon the right to contract has recently become a living question by reason of the laws passed in several of the states, including Ohio, limiting the hours of labor of women and children, and in certain industries. A law to that effect has been upheld in Oregon, and has been also upheld in Ohio by the circuit court of Cleveland, and the case is now pending in the Supreme Court. The grounds upon which the state undertakes to limit the hours of labor in these cases is in the interest of sound morals, good health for our women and the general welfare of our citizens. See, *Bolton v. State*, 11 C.C.(N.S.), 472.

Upon full consideration of the law, its purposes and the good that may be accomplished by it, without apparently doing harm or injustice to the employer, I am of the opinion that this legislation is a valid exercise of the police power by the Legislature.

If it were a doubtful question, and at best it appears to be so, it would be my duty to sustain the law as a constitutional enactment. Unless the law is *clearly*, palpably in conflict with the Constitution so that there is no doubt or hesitancy in the mind of the court, it should not be declared unconstitutional. If there be any doubt as to its validity, that doubt must be resolved in favor of its constitutionality. *State, ex rel, v. Covington*, 29 O. S., 103-118; *Marmet v. State*, 45 O. S., 63-64.

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The judgment of the court is that the petitioners, Saul Berger and William Skahn be remanded and delivered over to the officer, Constable Tiernan, to be dealt with according to law.

**AUTHORITY TO INCREASE OR DIMINISH PAY OF
POLICE OR FIREMEN.**

Common Pleas Court of Cuyahoga County.

CHARLES W. STAGE V. THOMAS COUGHLIN, AS AUDITOR, AND JOHN
KRAUSE, AS TREASURER OF THE CITY OF CLEVELAND.

Decided, March 15, 1912.

*Policemen and Firemen—Tenure of. Dependent upon Conditions Not
Existing at Time of Appointment—And Salaries May be Increased
or Diminished During Term of Office.*

Members of the police and fire departments of a municipality are not appointed for a "term" within the meaning of Section 4213, P. & A. Anno. General Code, and having no fixed or definite term the restriction as to changes in salaries does not apply to them, and council has power to increase or diminish their salaries after appointment.

LAWRENCE, J.

This action has been brought by Charles W. Stage, as a taxpayer, on behalf of the city of Cleveland, against the auditor and treasurer of said city, the city solicitor, on request in writing, having refused to bring the same. The object of the action is to enjoin the said auditor and treasurer, respectively, from issuing and paying warrants to members of the police and fire departments of said city for salaries and compensation in excess of the amounts received by them prior to December 1, 1911, excepting as to such members of either of said departments as may have been appointed subsequent to December 1, 1911.

It is alleged in the petition, amongst other things, that on the 9th day of October, 1911, the council of said city passed two

separate ordinances to take effect December 1, 1911, by one of which the salaries of the members of the police department, and by the other the salaries of the members of the fire department, were fixed at amounts in excess of the salaries theretofore fixed by the council by ordinances passed May 4, 1903.

And it is further alleged that the members of the police and fire departments were paid for the month of December, 1911, and the first half of January, 1912, at the increased rates so fixed by the said ordinances passed October 9, 1911; and that, unless restrained by this court, the said auditor will issue to said treasurer his warrants for the payment of such salaries for the second half of January, 1912, in accordance with the provisions of said last mentioned ordinance and in excess of the amounts fixed for and drawn by members of said departments prior to the first day of December, 1911, and that the said treasurer will pay the same.

As the ground for the relief asked, it is claimed that the members of said police and fire departments hold their respective positions during good behavior, and can be dismissed only for cause and after hearing on charges preferred; and that, in respect to the increased compensation provided, the ordinances passed October 9, 1911, are invalid, excepting as to those persons who may have been appointed since December 1, 1911, when said ordinances took effect, for the reason that it is provided by the laws of this state that the salary of any officer, clerk or employe, when fixed by council, shall not be increased or diminished during the term for which he may have been appointed.

The defendants have demurred to the petition of the plaintiff, on the ground that said petition does not state facts sufficient to constitute a cause of action or to entitle the plaintiff to the relief prayed for; and the case has been heard on this demurrer.

The question thus presented is, whether Section 4213 of the General Code, which provides that the salary of any officer, clerk or employe (of a city) shall not be increased or diminished during the term for which he was elected or appointed, applies to members of the police and fire departments, and prevents the council from changing the salary of any such member after his appointment.

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The first thing to be determined is, whether this question is an open one in this state.

In the case of *State, ex rel Edward W. Spaller, v. the City of Painesville et al*, 13 C.C.(N.S.), 577, the Circuit Court of Lake County, two judges sitting, sustained a demurrer to a petition in mandamus brought by the relator, in which it was alleged, in substance, that he was appointed a patrolman in the police department of the city of Painesville on October 12, 1903, under an ordinance by which his salary was fixed at \$720 per year; that on December 18, 1907, the council of said city, by ordinance, increased his salary to \$840 per year; that he continued in his position under his original appointment; that on January 12, 1910, the council passed an ordinance assuming to reduce his salary from \$840, as fixed by the ordinance of 1907, to \$720 per year, being the amount at which his salary was fixed when he entered the service of the city as patrolman; that since the enactment of the ordinance of January 12, 1910, the city refused to pay him the difference between \$720 and \$840 per year; that there was due and payable to him from the city the sum of \$90, which it wrongfully refused to pay him; and that there was money in the police fund of said city which could be properly and lawfully appropriated to the payment of his claim; and he prayed that a writ of mandamus be issued commanding the city, by its proper officers, to issue to him a warrant for the amount claimed to be due to him, and to pay such warrant.

A judgment having been entered in favor of the defendants on such demurrer, a petition in error was filed by the relator in the Supreme Court, and the latter court affirmed the judgment of the Circuit Court of Lake County, without report.

In its opinion the circuit court held that a city council has no power to increase or diminish the salary of a police officer, appointed under the civil service provisions of the municipal code, during the term for which he was appointed, which, it was said, is during good behavior; and that the ordinance of December 18, 1907, which undertook to increase the salary of patrolmen to \$840 per year, was therefore void so far as it applied to the relator.

It seems clear that the demurrer to the petition in that case might have been sustained on two grounds other than the one stated. In the first place, there was no allegation in the petition that an appropriation had been made by the council which was applicable to the payment of the amount claimed. The allegation was merely, that there was money in the police fund of said city which can be properly and lawfully appropriated to the payment of said claim. A fund, derived from taxation or other sources, may exist, but, until an appropriation is made by the council, there is no authority or duty on the part of the auditor to draw a warrant for payment of a claim, and without such warrant the treasurer has no authority to make payment (Sections 3795, 3797 and 4285 of the General Code). The judgment on the demurrer to the petition, therefore, may well have been affirmed upon the ground that the relator had shown no right to a writ of mandamus. *Chicago v. People*, 210 Ill., 84 (seventh syllabus); *Ampt v. Cincinnati*, 8 N. P., 535.

The judgment may also have been affirmed on the ground that the council had power to increase or diminish the salaries of police officers. In that view, the ordinance passed by the council of Painesville on January 12, 1910, would be perfectly valid, and, as the relator had received compensation in accordance with the terms of that ordinance, he had no valid claim to further compensation. It makes no difference in the result whether it be said that the ordinance of December 18, 1907, was valid, or that it was invalid. If it was valid, it was repealed by the ordinance of January 12, 1910; and if it was invalid, it never had any legal operation. In neither case could the relator have any lawful claim based thereon.

So, as it seems to me, the action of the Supreme Court can not be considered as any controlling authority on the question here involved, because the case was not reported, and a decision on the point in controversy was not necessarily passed upon by the judgment of affirmance.

The opinion of the Circuit Court of Lake County is entitled to respect and consideration, but that court is not a superior court of this jurisdiction, and therefore, the case mentioned is

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not of authority except so far as the reasoning on which the decision is based appeals to the judgment of this court.

Before taking up the opinion of the circuit court, reference may properly be made to certain other sections of the statutes which have a bearing upon the application of Section 4213 of the General Code.

By Section 4214, the council is required, except as otherwise provided, to determine by ordinance or resolution the number of officers, clerks and employes in each department of the city government, and to fix by ordinance or resolution their respective salaries and compensation.

By Section 4374 it is provided that the police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen and other police court officers, station-house keepers, drivers and substitutes, as are provided by ordinance or resolution of council.

By Section 4377 it is provided that the fire department of such city shall be composed of a chief of the fire department and such marshals, assistant marshals, firemen, telegraph and telephone operators as are provided by resolution or ordinance of council.

By Section 4378 it is provided that the police and fire departments in every city shall be maintained under the civil service system, as provided, which requires appointments thereto to be made from the lists certified by the civil service commission and in the manner specified.

By other sections provision is made for the suspension of the officers and employes in the police and fire departments for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given by proper authority, or any other reasonable and just cause; for notice of the charges; for a hearing of the charges by the director of public safety, and a judgment thereon, which judgment, if the charge be sustained, may be either suspension, reduction in rank, or dismissal from the department. The right of appeal to the civil service commission is given to any person in either department who is suspended, reduced in rank or dismissed from the department by

the director of public safety. And it is further provided that the members of the police and fire departments shall be dismissed only as provided by law.

By the statutes in force prior to the adoption of the municipal code in 1902, the city of Cleveland, as well as a number of other cities in the state, had separate pension funds for both the police and fire departments, which were created, held and invested as the statutes provided. The details were different, but in general members of these departments who became disabled while in the performance of duty, or who had been in the department for a certain number of years, could be retired from active service and placed on the pension roll at various rates of payment, but less than the salaries previously received. In the case of the fire department of this city, it was also provided that any member discharged from the fire department except for dishonesty, intoxication or a criminal act, after having served not less than twenty-two consecutive years, should be placed on the pension roll at six-sixteenths of his salary at the time of his discharge.

The present statutes authorize the establishment and maintenance of a fireman's pension fund by any city having a paid fire department, and in such case a board of trustees is created, who have charge of the investment of the fund and make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of it shall be paid and the amount thereof. It is further provided that, upon the organization of such board of trustees, all funds and property of every kind held by the trustees of an existing fireman's pension fund in the municipality, shall be transferred to the new board, and that all persons drawing pensions or entitled to them from an existing fireman's pension fund shall be and remain beneficiaries in the pension fund created under the present statutes, and shall receive such amounts and be subject to the rules and regulations adopted by the board of trustees. Similar provisions are made in respect to police pension funds.

While it may be, if the rules and regulations so provide, that persons placed on the pension roll remain technically and in a

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sense members of the department, for disciplinary purposes, such persons give up their former positions and are retired from all active service, and, in lieu of the salaries formerly received, they are paid pensions. All this is accomplished not by virtue of any statutory provision fixing the terms of office or employment, but pursuant to rules and regulations which the trustees are authorized to adopt and which may vary in different cities and at different times.

In the opinion of the circuit court in the Painesville case only one authority is cited as bearing on the question involved here. On page 583 this appears in connection with the following language:

“But in view of the fact that a patrolman once appointed serves until he is removed for cause, it necessarily follows that he is appointed for a term, to-wit, for that period of time during which he is permitted to hold the office. *People v. LaFevere*, 21 Colo., 218.”

An examination of the case thus cited shows that it is not authority for the proposition asserted. The point decided in that case was, that judges of the district court elected at the regular sexennial election for judges hold their offices for six years, and those elected to fill a vacancy hold only for the unexpired term. The decision was reached from a consideration of several sections of the state Constitution, under which it was provided, in substance, that the term of office of district judges should be six years; that the terms of office of all judges of the district should expire on the same day; that vacancies occurring in the offices of judges should be filled by appointment by the Governor, and the judges so appointed should hold office until the next general election and until their successors thereat should be duly qualified.

It is very plain that the court was considering a fixed and definite term of office and not an indeterminate holding. The only question was, whether a judge elected to fill a vacancy was entitled to hold his office for the fixed term of six years, or whether he should hold it for the unexpired portion of such fixed term. In the opinion it is said (on page 229):

"By counsel on both sides much learning has been displayed, and many fine distinctions drawn, as to the meaning of 'term,' 'office,' 'incumbent,' 'term of office,' and 'vacancy,' but we consider the discussion neither very important nor helpful. It is sufficient to say that 'term of office,' as used here, means the period or limit of time during which the incumbent is permitted to hold."

It will appear, in either view of the case, that such time expired at a definite date.

In *Mechem on Public Offices and Officers*, Section 385, it is said:

"The word 'term,' when used in reference to the tenure of office, means ordinarily a fixed and definite time, and does not apply to appointive offices held at the pleasure of the appointing power."

There are many authorities to the same effect, among which are the following: *Thorp on Public Officers*, Section 303; 23 *Am. & Eng. Ency. of Law*, 404; *State v. Galusha*, 74 Neb., 188; *People v. Brundage*, 78 N. Y., 403 (407); *State v. Twichel*, 9 Wash., 330 (333); *Crowell v. Mason*, 101 Ga., 246 (254); *State v. Stonestreet*, 99 Mo., 361; *Somers v. State*, 5 S. Dak., 321; *People v. Curney*, 31 N. Y. App. Div., 309; *Lerington v. Kennick*, 105 Ky., 779.

In *State v. Massillon*, 2 C.C. (N.S.), 167, it was held that a health officer appointed by the board of health under Section 2113, Revised Statutes, provided that he should serve during the pleasure of the board, does not come within the purview of Section 1717, prohibiting the increase of salary of an officer during his term, and on page 168 of the opinion it is said:

"The word 'term' has significance, as we think under that section of the statute. It simply means the limit, that is, during the period that the office is limited, during that period his salary shall not be increased. But in this case there is no limit fixed by law. . . . It is not a term, for the reason that there is no limit to it."

In the opinion of the court in *Thorp v. Brigham*, 35 N. H., 240, it is said:

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“On the part of the respondent it is insisted that when a law clearly provides for the term of the continuance in office, as to when and how it shall terminate, that then the term of office is thereby fixed. But it is obvious that by this proposition, if it were adopted, the term of every office would be fixed, for it is believed that no office can be imagined with respect to whose term there is no regulation as to when and how it shall terminate. The term of an office means the period of time for which the incumbent has a right to it, so that if such period of time be not fixed, the term is not fixed. In case of an office held during the pleasure of another, the official term, that is, the continuance of the incumbency, is uncertain and unfixed until the mandate of removal has been issued.”

The plaintiff here alleges in his petition that the members of the said police and fire departments hold their respective positions during good behavior, but that is a mere conclusion of the pleader. There is no such language in the statute. The statute authorizes removals for cause, in the mode prescribed. Some of such causes relate to misconduct, but the incumbents may also be removed for incompetency or for any other reasonable and just cause; besides, as has been seen, they may be retired under the pension laws. In any case the termination depends on some event or contingency which may occur subsequent to the appointment, but which may never occur. The time is thus not fixed, but is uncertain and depends on conditions not existing at the time of appointment. In effect, the tenure is until removal or retirement by the proper authority; and it seems to me that the case, in this respect, is not essentially different from a case where removal may be had without cause, so far as the question of a term is concerned. In both cases the position is held for an uncertain period, subject to termination by the action of some other officer or tribunal.

The assumption of the circuit court in the Painesville case that, because a patrolman once appointed may serve until he is removed for cause, it necessarily follows that he is appointed for a term, to-wit, for that period of time during which he is permitted to hold his office, if correct, would equally apply to one who may be removed without cause; and yet all the authorities

seem to agree that the latter has no term of office. Mr. Mechem, in Section 448 of his work, says:

"The power of removal * * * may be absolute or conditional. It is absolute when it is vested in the unlimited discretion of the removing officer to be exercised at such time and for such reasons as the latter may deem proper and sufficient. It is conditional when the time, the manner or the reason is placed beyond the mere discretion of the removing officer."

There is one other matter of which, perhaps, I should speak. In the opinion in the Painesville case it is said that the construction there adopted will conduce to the good of the service and to protect the officers of these two departments against unwarranted interference with their salaries by way of reducing them, and, on the other hand, will take away from such officers the temptation to be constantly using their influence and office to secure increased emoluments.

The perspective at Painesville is probably somewhat different from that at Cleveland, but it seems to me unlikely that the council would ever be influenced by any motives so small as to make an unwarranted reduction in salaries, especially as it has no power to make or control appointments, and it ordinarily would have to deal not with a single individual, but with a body of men; nor does it seem reasonable to anticipate that the council, restricted as it is in the amount of taxes levied, would be induced by mere importunity to grant an extravagant increase of salaries. The ordinances in question here show no such disposition, and I venture to say that common experience will show that city councils, in fixing salaries, are usually fair both to officers and employes and to the public. The general tendency in this city has been to make slight increase in salaries, from time to time, but no more than the growth of the city and the increased cost of living would justify.

If the contention of the plaintiff is correct, the result will be either that rates of compensation once fixed must remain unchanged as to all, whatever the change in conditions may be, or else that officers performing the same kind of duties will be paid varying rates of compensation, those longer in the service, and presumably the more experienced and efficient, being generally

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paid less than the more recent appointees. I can not see how this situation will conduce to the good of the service.

From the nature of the tenure of the positions held by members of these departments, as shown by the statutes bearing on the subject, my conclusion is, that they are not appointed for a "term," within the meaning of Section 4213 of the General Code; that, having no fixed or definite term, the restriction as to changes in salaries does not apply to them, and the council has power to increase or diminish their salaries after their appointment; and that the ordinances passed by the council of the city of Cleveland on October 9, 1911, are valid and apply to all members in said respective departments at the time said ordinances took effect, as well as to those subsequently appointed.

The demurrer to the petition will be sustained, and the plaintiff not desiring to plead further, the petition will be dismissed at plaintiff's costs.

CONTRACT WITH AN UNAUTHORIZED AGENT.

Common Pleas Court of Franklin County.

CHARLES A. HARRIS v. LOUIS H. HAMMEL AND THE GASSER
COFFEE COMPANY.

Decided, January, 1912.

Pleading—Liberty of the Code Does Not Permit Looseness in Statement of Cause of Action—Pleading of One Cause and Attempt to Prove Another—Action for Commissions—Contracts.

The rule that an action must be founded upon a definite theory which can not be thereafter changed or departed from, does not permit a plaintiff in a suit on an express contract to prosecute his action as for breach of an implied contract.

J. C. Nicholson, for plaintiff.

Vorys, Sater, Seymour & Pease, contra.

KINKAD, J.

Plaintiff alleged that "on or about the tenth day of February, 1907, the plaintiff entered into an agreement, not in writ-

ing, with said defendants wherein and whereby said defendants engaged the services of plaintiff for the sale of coffee, and agreed to pay said plaintiff for said services a commission of three cents per pound on all coffee that plaintiff should secure purchasers for. On or about the 19th day of February, 1907, plaintiff, acting under said agreement, procured for said defendants a purchaser in the person of Rowe, Schleyer & Company for 3888 pounds of coffee and did then and there sell to said Rowe, Schleyer & Company 3888 pounds of coffee," etc.

On trial it appeared that Hammel was acting as the agent of the Gasser Coffee Company, and that the purchaser named in the pleading had entered into a written contract with the Gasser Coffee Company, and that Hammel had no right to enter into a contract to pay any commission. The evidence of plaintiff was that Hammel had stated that he would pay him a per cent. as commission, while the defendants deny it. The court is concerned only with the claim made by plaintiff.

A motion to compel plaintiff to elect which he wished to hold, the principal or the agent, was sustained, the plaintiff electing to hold the latter.

As the petition stands plaintiff is seeking to hold defendant, Hammel, on the *express* contract originally declared upon. Plaintiff did not undertake to get a purchaser for Hammel. If Hammel is liable it is because he impliedly represented that he had authority to make a contract to pay commission when he had not. To warrant recovery upon a contract for recovery of commission the same must be proved as laid. But Hammel could not be held personally on the contract for commission, but only for the breach of his implied contract to pay a commission made without authority.

The joinder of the principal and agent, as was done in this case, was improper, and hence the action of the court compelling election was proper.

The joinder of the principal and agent was entirely improper, and is perhaps the cause of the difficulty.

It is fundamental that a cause of action must be founded upon a definite theory, which can not thereafter be changed or departed from.

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When plaintiff elected to hold Hammel individually, the theory of the cause still remaining an express contract, recovery may not be had upon an implied contract on the theory that Hammel should be held personally liable because he had made an alleged contract in excess of his authority as an agent.

If plaintiff in the first instance had seen fit to have sued Hammel alone, he would had to have alleged different facts.

I do not see any ground upon which the court may properly sustain the motion for a new trial. If it should do so, to be consistent the petition should be amended to conform to the theory upon which an agent may be held liable. But the statute forbids such an amendment, providing, as it does, that amendments may be made only when the same do not substantially change the claim or defense.

Rules and formulae in legal procedure must be followed and observed, so that parties called upon to answer claims asserted against them shall definitely know what they are expected to meet. It is too late, if it turns out after trial, that a wrong theory was adopted in the action.

The well considered case of *Trust Co. v. Floyd*, 47 O. S., 525, furnishes the rule for this case. The theory upon which the liability of an agent when he has exceeded his authority in making a contract rests, is upon his implied promise he possesses the authority he assumes to have.

Williams, J. (page 541), observes that:

“Under our present system of pleading, it is not important what was formerly the most appropriate remedy. Upon the facts stated in the petition, the law, we think, implied a promise on the part of the defendants, that in making the contract with the plaintiff, they had authority to bind the corporation they assumed to represent; and if they had not, they are answerable for the consequences.”

It might be urged that enough facts are now stated in order to disclose the implied obligation on the part of Hammel. But such is not the case. The petition does not state the facts as to the capacity in which Hammel acted, nor his want of authority and for whom in fact the contract by the purchaser was made.

It is true that this all appears in the evidence. But I do not believe that it was the intention under the code to be so liberal, or so loose, that we may state one case and prove another. Indeed it is just as important now as ever when remedies were afforded by the common law, because the code did not undertake to abolish the distinctions between rights and causes of action. Rules and formulae are essential to development and truth.

The law of pleading is technical and arbitrary. Our system is the accumulation of hundreds of years of experience and is the best adapted to the purpose of arriving at a speedy and just decision. Its establishment was for the purpose of facilitating the process of investigating the truth by courts of justice. The rules and formulae of the system must be uniformly enforced so as to prevent the looseness which was so common in the older systems. No rule should be more rigidly adhered to than that an action should be founded upon a definite theory, which can not be thereafter changed and departed from. To have submitted the case to the jury, after plaintiff's election, would have been a change of theory, and a submission without proper pleading conforming to such changed theory.

The motion for a new trial is overruled, and the action is dismissed.

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SIGNS AND THE RIGHT TO PLACE AS BETWEEN TENANTS.

Common Pleas Court of Cuyahoga County.

THE GOODYEAR RUBBER COMPANY V. THE GOODRICH RUBBER COMPANY AND THE LOOMIS REALTY COMPANY.

Decided, November 27, 1911.

Lease—Failure to Record Immaterial—So Far as Such Failure Concerns One Claiming Lack of Notice of Rights Reserved Therein, When—Reformation of, Will Be Denied, When—Signs and the Right to Place Them on Outer Wall.

1. A party can not claim to have been misled as to the terms of an unrecorded lease, where it appears that no search was made of the records for the lease and reliance, therefore, was not placed upon the fact that no lease appeared of record.
2. Moreover, a party occupying the middle portion of a building nowhere adjacent to the outer wall has notice, without consulting the lease, that the party occupying the intervening space adjacent to the outer wall has the exclusive right to the use of that wall for advertising purposes.
3. Reformation of a lease will not be granted on a mere showing that some provision, which was agreed upon between the lessor and an agent of the lessee was not incorporated into the lease subsequently drawn by the lessor and executed by officers of the lessee company.

Ammerman & Thompson, for plaintiff.

Hills & Van Deveer and Hoyt, Dustin & Kelley, contra.

FORD, J.

On March 3, 1911, the Loomis Realty Company leased the two west ground floor rooms of the Spencerian Building, on Euclid avenue in the city of Cleveland, to the Goodyear Tire & Rubber Company. In addition to the other usual clauses in a lease of this kind, there was the following provision:

“It is agreed that there shall be no sign placed on the building, except in the spaces provided for signs on the Euclid front; and that the party of the second part may desire to have lettering in gold or silver letters on the plate glass window or doors except that the party of the second part is given the exclusive

right to place its own sign on the west side of the building, occupying a space not exceeding forty feet in depth from the front corner of the building and the full height of the building, which wall sign may be illuminated at the expense of the party of the second part should the second party so desire."

The fair construction of this quotation the court believes is this: In the first instance it was agreed that there should be no sign placed on the building. The expression, "It is agreed that there shall be no signs placed on the building," is an agreement in which both parties were interested. The owner was interested in preserving the appearance of the building as a whole, that there should not be placed on the building unsightly signs for advertising that would destroy the architectural appearance of the building, and that might prove to be detrimental to other occupants. The Goodyear Company had an interest in some degree in the same way, so that the space that it rented should not be rendered less valuable by reason of ostentatious or competitive signs placed close by. This agreement apparently went to the whole building, and is equivalent to establishing that there shall be no signs whatever placed on the building. The first exception is, that "except in the space provided for signs on the Euclid front, and that the party of the second part may desire to have lettering in gold or silver letters on the plate glass window or doors." That exception seems to limit not only the Goodyear tenants, but every other tenant of the building, to placing signs in gold or silver leaf upon the windows or doors of the Euclid front.

Now comes a further exception, which is as follows: "Except that the party of the second part is given the exclusive right to place its own sign on the west side of the building." If the language of this last exception had stopped at that point, then the Goodyear Company would have had no limitation whatever as to the size of the sign that it might have placed, under this exclusive right, on the west side of the building. It might have occupied the entire west side of the building. The balance of the language used in this second exception is as follows: "occupying a space not exceeding forty feet in depth from the front corner of the building and the full height of the building." This last language, by fair construction, seems to be, therefore, a

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limitation, which provides that, instead of occupying the whole west side of the building, the lessee should only occupy a space forty feet in depth and to the full height of the building. The court concludes, therefore, that the fair construction of this language is, that the lessee was given the exclusive privilege to advertise upon the west wall of the Spencerian Building.

Shortly after the lease was entered into between the Loomis Realty Company and the plaintiff, the Loomis Realty Company entered into a lease with the Goodrich Rubber Company for the lease of a room in the central part of the building and having no relation to either the west wall or the east wall of the building as a whole, or, in other words, it occupied one of the rooms not bounded by any exterior side wall. In connection with this lease, the Loomis Realty Company gave to the Goodrich Company the right to put a sign occupying the middle portion of the west wall fifty feet in length and to the full height of the building. The plaintiff contends that this is a violation of its contract.

The Goodrich people, early in May, set about painting a sign on this last mentioned space, and completed the same between the 1st and 5th of May. The plaintiff brings this action to compel the defendant to dispense with this sign, and asks for a mandatory order to that end from the court.

The Goodrich Company filed an answer in which it says that the plaintiff should be estopped to ask for this action of the court, because, in the first instance, the plaintiff failed to record its lease, and, second, because it stood by knowing or claiming to know that it had the right to the exclusive control of the west side of the building for advertising purposes. The Goodrich Company makes this claim because it says that Mr. Hammerle, who was the sales agent in charge of the plaintiff's store here, knew from the beginning that such work was going forward. So far as the evidence goes, it appears that Mr. Hammerle was merely the sales agent in charge of the store, his duties being limited to the duty of making sales of plaintiff's line of goods. It does not appear that he was familiar with the terms of the lease; nor does it seem fair that the plaintiff should be held to be such an agent as that notice to him would be notice to the company. The evidence shows, however, that Mr. Hammerle, while

not knowing the facts in regard to the terms of the lease, did communicate the fact to his principal at Akron, and that the principal, with promptness, protested to both the realty company and the Goodrich Company.

Upon the whole, the court holds that the plaintiff can not be charged with standing by and keeping silent, and thus presenting such a situation as would operate as an estoppel against this plaintiff.

So that brings us back from the time that the sign was painted to the time that the Goodrich Company entered into its contract; and the question arises, whether, at the latter time, the plaintiff did something or failed to do something that misled the Goodrich Company into making a disadvantageous contract.

The Goodrich Company claims that the plaintiff misled it in this, that it did not have its lease recorded; but the court believes there is no virtue in this claim, for the reason that it does not appear from the evidence that the Goodrich Company exercised the diligence of making an examination of the records. In other words, it did not rely upon the state of the record. The purpose of the record, after all, is to give constructive notice; and if the Goodrich Company had actual notice, the state of the record in fact becomes a matter of no importance. The law is conceded to be, I believe, that "a lease of a part of a building *prima facie* passes the outer wall adjacent to the rooms or apartment named, as a part of the premises leased; and consequently, the lessee has the exclusive right to the use of such wall for advertising purposes." The Goodrich Company, at the time it made its contract, knew that the plaintiff was in possession, and knew that, under the law, unless there was a restriction, the plaintiff was entitled to the whole lower half of the west wall for advertising purposes, because its occupation extended the whole depth of the building; and when the Goodrich Company was contracting to occupy the middle portion of the last mentioned space for its sign, it was clearly put upon inquiry. If it had made inquiry, being aroused thereto by such notice, the inquiry would have disclosed the entire terms of plaintiff's lease, and would have disclosed that plaintiff was entitled to both the lower and the upper half of the west wall in question, if the court's construction of the language in the lease is sound.

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In addition to this notice that the plaintiff was entitled to the whole lower half of the west wall, it saw that plaintiff was occupying a portion of the upper half, which the court believes was sufficient to put it upon inquiry before consummating its contract with the Loomis Realty Company.

It seems that the Goodrich Company was not misled by the fact that the plaintiff's lease was not upon record, because it is apparent that the Goodrich Company did not undertake to rely upon it.

It is equally clear, the court may add in passing, from the whole evidence, that the Goodrich Company, instead of relying upon record, or upon appearances, or upon silence, really relied upon the statement and good faith of the representative of the Loomis Realty Company.

It is said, "a most usual application of the doctrine of estoppel *in pa's* arises from the misrepresentation or concealment of material facts on the part of the person to be estopped. It is a definite and well-settled rule of equity, which has been adopted by the courts of law, that where A has, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable neglect, induced B to believe certain facts existed, and B has rightfully acted on this belief, so that he would be injured if A is permitted to deny the existence of such facts, A is conclusively estopped to interpose a denial thereof."

And again, as to silence:

"As a general rule, an estoppel arises from silence as well as words; but this is only where there is a duty to speak, and the party upon whom the duty rests has an opportunity to speak, and, knowing the circumstances requiring that he speak, keeps silent, or, in other words, where silence amounts to a fraud, actual or constructive."

And again:

"It may be stated as a general rule that it is essential to the application of the principle of equitable estoppel that the plaintiff claiming to have been influenced by the conduct or declaration of another party, to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge;

and that, where the facts are known to both parties, and both have the same means of ascertaining the truth, there can be no estoppel."

The court has put out of the way the situation at the time the sign was painted, and is considering the situation at the time the contract was made. If the Goodrich Company is not entitled to take any advantage of the fact that the plaintiff's lease was not recorded, because it did not rely upon an examination of the record, it is difficult to discern anything that the plaintiff could have done, or anything that it was called upon to do, that would have acquainted the Goodrich Company with the situation. The plaintiff did not know that such a contract was being entered into, and therefore, under the circumstances, could not be charged with either culpable negligence, or of misrepresentation, or of maintaining a wrongful silence. It is said:

"Another essential element of estoppel by misrepresentation or silence is that one party should have relied upon the conduct of the other party, and been induced by it to act or to refrain from acting, so that he will be substantially injured if the other party should be allowed to repudiate his action; and this rule applies as well where the conduct of the party estopped consists of silence as where it consists of a positive act."

Upon the whole proof, the court is convinced that the Goodrich Company relied solely upon the representation of the Loomis Realty Company, and did not rely in any respect upon any acts or any failure to act on the part of the plaintiff.

The court therefore concludes that the defense of estoppel urged by the defendants in this case, has not been sustained.

The defendant, the Loomis Realty Company, asks for a reformation of the contract, on the ground that there was a mutual mistake. To support this, Mr. Loomis testifies that the negotiations for the lease were had in the rooms subsequently leased; that half an hour or more was consumed in such negotiations. He says further (see page 20 of the record):

"After we had talked about the terms of rental to be paid for the store, Mr. Schiltz asked me if in the renting of the stores we would give him a privilege of putting a sign on the west wall, for a small sign space on the west wall. I said, 'Yes we will

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give you a large space.' He wanted to know how large. I said, 'We will give you,' I thought a moment; I said, 'We will give you space thirty feet in depth and the full height of the building.' He remarked that they would like to have a little longer space for the wording of their sign, and asked if I could make it a little longer than that. I said, 'Yes, I will give you a third of the building, which will be forty feet.'

"Q. The room which was afterwards occupied by the Good-year Company? A. Yes. He asked me what, if anything, I was going to do with the rest of the space. I said, 'I don't know.'

"Q. Is that substantially all the conversation that was had with reference to the sign space on the wall? A. I think we had some talk about the second floor, as I remarked it had not been rented yet, but I would run the risk of giving them the exclusive use of the front forty feet, disregarding the renting of the second floor space."

It is unaccountable and inexplicable how, after such a conversation, a man of Mr. Loomis' intelligence, with his knowledge of words and of their use, and his long business experience, when he repaired to his office to reduce this contract to written form, he could have employed the language found in the lease to express the agreement fairly to be inferred from the testimony last quoted. But this is his testimony, and it stands wholly undenied by Mr. Schiltz. If the court felt that the plaintiff was bound by the failure of Mr. Schiltz to deny this testimony of Mr. Loomis, he would feel that such failure to deny amounted to an admission and would constitute that clear, convincing and overwhelming testimony that is necessary to warrant the reformation of the contract. But is Mr. Schiltz's failure to thus deny the determining thing? The court thinks not. Mr. Schiltz, it appears from the testimony, was a general sales agent deputed to negotiate for the lease of premises in Cleveland. He had negotiations with the president of the Loomis Realty Company. He represented his principal, whose place of business is Akron. Negotiations between these two gentlemen were had about this lease. It is said that the gentlemen, with others, repaired to the office of the Loomis Company, and here Mr. Loomis dictated the lease. The testimony of Mr. Loomis is:

"Q. Did you then sign the lease for the Loomis Realty Company? A. Yes, sir.

"Q. What did you do then? A. Mr. Schiltz took it with him, took both copies.

"Q. What for? A. To have them signed at Akron.

"Q. By the officers of the plaintiff? A. Yes, sir.

"Q. The Goodyear Tire & Rubber Company? A. Yes, sir."

The question is, when did the minds of the parties meet and concur upon the terms of this lease? It would seem that Mr. Loomis, notwithstanding all that had transpired prior to this time, would have had the right to withdraw from the effects of his acts so far. Up to the time that the lease came into the hands of the proper officers of the Goodyear Company, he could probably have withdrawn entirely from the contract. It seems to the court that this contract was not concluded until the Goodyear Company had affixed its signature by its proper officers. It does not appear that Mr. Schiltz was authorized to sign a lease, or to enter into a lease for the company. The company, the court believes, would have had the right, upon the receipt thereof from Mr. Schiltz, to decline to accept the terms therein expressed. The lease thus coming into the hands of the officers of the Goodyear Company in effect was a proposition for the renting of the property under consideration. The acceptance of that would be expressed by a proper signing and delivery of the lease, either directly or by mail, to the Loomis Company. If the court is not all wrong about this, it can not be claimed that the Goodyear Company, upon the examination of this lease by its proper officers and the authorization by those officers to have the same signed, entered into any other contract than that expressed in words in the body of the lease.

The court therefore decides that the defendant, the Loomis Realty Company, is not entitled to have its petition for reformation granted.

Decree in accordance with findings hereinbefore stated.

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VALIDITY OF ACT LICENSING MONEY LENDERS.

Common Pleas Court of Franklin County.

**F. F. CAIN v. PEOPLES SALARY LOAN CO.; AND HOMER H. SHARP
v. STATE OF OHIO.**

Decided, January 16, 1912.

Constitutional Law—Act Licensing Money Lenders—Not Rendered Invalid by Reason of Exemption Therefrom of Banks and Building Associations—Interest of Husband and Wife in Earnings of Each Other—102 Ohio Laws, 469.

1. The nature and conduct of the business of banks and building associations, and the existing laws applicable to them in the way of regulation and inspection of their business, furnishes a sufficient warrant for their exemption from the provisions of the act of May 31, 1911, requiring that persons engaged in the business of making loans upon chattels or personal property of any kind and of purchasing or making loans upon salaries or wage earnings secure a license therefor from the Secretary of State, and the classification thereby created is a proper one and the act is not rendered violative of the equality clause of the Constitution by reason thereof.
2. Neither is this act rendered unconstitutional by reason of the restriction which it places upon the right of a married man to borrow money without his wife joining therein.

*Gumble & Gumbert and Arnold, Morton & Irvine, for plaintiffs.**B. W. Gearheart, contra.***RATHMELL, J.**

The first case is an action brought by a stockholder of the Peoples Salary Loan Company, a corporation formed for the purpose of purchasing and loaning money on salaries and wage earnings, and seeks to enjoin said company from complying with the requirements of an act of the General Assembly to regulate and license such a business (102 O. L., p. 469), on the ground

that said act is unconstitutional and void, and that compliance with said act in the way of paying a license fee is a misapplication and unlawful dissipation of the assets of the company.

The second is an error proceeding seeking to reverse judgment rendered against plaintiff in error by the police court of the city of Columbus, on the charge of his engaging in the business of making loans upon chattels and personal property; and purchasing and making loans upon salaries and wage earnings; and that on or about the 7th day of August, 1911, plaintiff in error made a loan to one Sleade, secured by a chattel mortgage on chattel property and by an assignment of his wage earnings as an employee of the Ferris Steam Motor Works; neither said conveyance nor said assignment being signed by Sleade's wife—he being a married man; and that Sharp had not obtained a license to engage in such a business, contrary to the statute in such case made and provided.

Both of said actions involve the constitutionality of the act of the General Assembly referred to, passed May 31st, 1911, and found in 102 O. L., 469.

Section 1 of the act provides:

“No person, firm or corporation except banks and building and loan associations shall engage or continue in the business of making loans upon chattels or personal property of any kind whatsoever, or of purchasing or making loans upon salaries or wage earnings, without first having obtained a license so to do from the Secretary of State.”

It is claimed that the exception of banks and building and loan associations creates an unreasonable discrimination between persons, firms or corporations engaged in the same business, and thereby violates the constitutional guaranty for equal protection of the law, found in Section 1, Article XIV of the Federal Constitution; and in Section 1, Article I of the Bill of Rights, and is not of uniform operation as required by Section 26, Article II of the Constitution of the state.

That the business of loaning money upon chattels or personal property, and of purchasing or making loans upon salaries or

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wage earnings, is one which the state, in the exercise of her police powers, has the right to reasonably regulate, while not fully conceded, is not seriously challenged.

In view of the fact that the courts in other jurisdictions have pretty generally sustained legislation, under the police power, on similar subject-matter; and that our own court in the case of *Sanning v. City of Cincinnati*, 81 O. S., 142, has approved legislation on the subject, we consider that the right of reasonable regulation of such a business by the Legislature is hardly a matter to be questioned.

The state in the exercise of the police power within reasonable limits may distinguish, select and classify subjects of legislation, if the classification be not unreasonable, unjust or arbitrary; and a statute bearing alike on all individuals of each class with uniformity does not deny the equal protection of the law.

Field, Justice, in *Barbier v. Connolly*, 113 U. S., 27, speaking of the Fourteenth Amendment, says:

“Class legislation discriminating against some and favoring others is prohibited; but legislation which in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment.”

That proper classification and legislation under the limitations stated is not an invasion of the constitutional guaranty of the right of equal protection of the laws is supported by many cases, a few of which are: *Minneapolis Ry. Co. v. Beckwith*, 129 U. S., 27; *Field v. Barber Asphalt Co.*, 194 U. S., 621; *Gentsch v. State, ex rel.*, 71 O. S., 151.

Is the exception of banks and building and loan associations in the act an unreasonable or arbitrary classification?

Whether a particular classification upon which discriminating legislation is based is a reasonable or arbitrary one must depend to a very large extent upon the nature and purpose of the legislation.

It was held in *State v. Wichenhoefer* (Del.), 64 Atl., 273, that an act providing for licensing persons to charge more than legal

interest on loans not exceeding \$100 was not unconstitutional because it exempted from its provisions national banks, state banks and trust companies.

In that case the court remarked:

“The character and standing of the excepted parties, the nature and conduct of their business, and existing laws which were peculiarly applicable to them, furnished a fair and sufficient reason for the classification.”

In *State v. Hurlburt*, 32 Conn., 232, an act prohibited everybody except a national bank, a trust company chartered by the state, and a pawn broker from charging interest on loans at a greater rate than fifteen per cent.; *held*: that the statute was not in violation of the state and federal Constitution guaranteeing the equal protection of the laws. That the General Assembly in regulating usury had the right to discriminate between different classes of money lenders and borrowers, provided there was nothing apparently unreasonable in creating the distinction and all members of each class were treated in the same manner.

In *Re Home Discount Co.*, 147 Fed. Rep., 538, an act of the state of Alabama providing among other things that all persons engaged in the business of money broker or loaning money or taking security therefor by bills of sale, mortgages on, or conveyances of liens of any kind on personal property or personal effects or other personal security, should express in the instrument securing such loan the rate of interest, the date of the loan, the fact that the instrument is taken for a loan of money, a minute description of said property and if household goods from whom purchased, the date when the loan is due and should file the instrument for record. Also one section providing that the act should not apply “to the business of banking and loans when the amount exceeds \$75.” *Held*: the Legislature had not unjustly discriminated between the class whose conduct the act regulated, and those whose conduct it left unregulated.

The court in the opinion says:

“Loans by banks and bankers under \$75 and loans over that amount no matter by whom made were rarely secured by an as-

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signment of future wages or a lien upon household goods, and were not productive of the evil which the statute seeks to cure. The Legislature knew that the taking of the security named by one class of lenders had almost invariably brought forth evil, while the same loans on the same security by another class in 'the business of banking' had seldom, if ever, been harmful to the public welfare. The law makers in devising the remedy had to consider the different habits and conduct of man in their occupation as to their loans, in order to apply an intelligent and just preventative and in doing so necessarily discriminated between these classes according to their well known habits and customs in the matter. * * * If the practice of one class of money lenders makes such precaution necessary as to them it would be going an unwarrantable length to hold that the state police power must either leave them entirely alone or else provide the same regulation regardless of any need for them, for like loans made by all other classes of money lenders."

In *Dewey v. Richardson*, 206 Mass., 430, a provision regulating the business of making small loans of \$200 or less upon which a rate of interest greater than twelve per cent. per annum is charged, and prohibiting the carrying on of such business without obtaining a license was held not unconstitutional by the exemption from the provisions of the act of "national banks, all banking institutions which were under the supervision of the bank commissioner, and loan companies, and loan associations established by special charter and placed under said supervision."

The court said:

"This objection was considered in the case of *Mutual Loan Co. v. Martell*, 200 Mass., 482, which arose under the same statute and it was held that it was not fatal to the validity of the act.

"The Legislature might find that these classes of corporations being subject to official supervision under the law even if they did some business of the kind described in the statute would not be likely to conduct their business oppressively in dealing with small borrowers."

In *Marmet v. State*, 45 O. S., a law requiring a license of the owners of vehicles used upon the streets of a city of the first grade of first class, exempting farmers marketing the products

of their farm, was held not in conflict with the Constitution on contention of unjust discrimination.

Legislation relative to the Sunday laws involving the exercise of the police power of the state, affords illustration of classification not violative of the provision guaranteeing equal protection of the laws.

It is pointed out as one basis for distinction and classification that banks and building and loan associations are already subject to statutory regulation in inspection. In a number of cases in other states, some of which have been noted, exception such as has been attempted here, has been approved as legitimate classification for purposes of regulative legislation.

On the whole it appears fair to assume that the nature and conduct of the business of the excepted parties, and the existing laws applicable to them in the way of regulation and inspection of their business, furnish a fair and sufficient reason for the classification by the law making power, and that the statute is not in violation of the equality clauses of the Constitutions by reason of the exceptions.

“A law is uniform in its operation when every person who is brought within the relation and circumstances provided for is alike affected by the law. It must have a uniform operation upon all those included within the class upon which it purports to operate.” *Senior v. Ratterman*, 44 O. S., 661, 678.

The classification not appearing arbitrary, and the statute operating uniformly as to all individuals in the same class, all persons similarly situated, and engaging in the business sought to be regulated by the statute, it is not in violation of Section 26, Article II of the state Constitution.

Section 4 provides:

“No such person, firm, or corporation so licensed shall receive any assignment of salary or wages signed in blank, but all blank spaces shall be filled in with ink or typewritten with the proper names and figures, showing the name of the firm, person or corporation by whom the person making the conveyance or assignment is employed. If the borrower is married the contract con-

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veyance or assignment shall be void unless it also contains the name of the husband or wife as the case may be of the borrower."

It is contended that this section places an improper restriction on the right to contract if the borrower be a married person.

While generally every citizen has a right freely to contract for the price of his labor, services or property, such liberty is not absolute and universal; and it will not be contended but that the state may restrain some individual from all contracts and all individuals from some contracts, in a proper case. Private rights exist subject to public welfare.

In *Chambers v. City of Cincinnati*, 11 C.C.(N.S.), 273, a provision of an ordinance requiring that, if the pledgor is a married man, his wife must sign the application for the loan, was held of no effect. We are not favored in the report with the reason for this holding.

In *International Text Book Co. v. Wissinger*, 160 Ind., 349, a statute prohibiting the assignment of future wages by employes is held not void as an unreasonable restraint upon the liberty of the citizen or as depriving him of his property without due process of law.

The restriction in the act under consideration is far less than that sustained by the Indiana court.

In *Mutual Loan Co. v. Martell*, 200 Mass., 482, a statute requiring a license of any one engaging in the business of making loans on household furniture or other personal property exempt from attachment or by assignment of wages for less than \$200 contained the following provision:

"No such assignment of an order for wages to be earned in the future shall be valid when made by a married man, unless the consent of his wife to the making of such assignment or order is attached thereto."

The regulations as to wife's consent was held valid. Knowlton, Judge, said:

"A married man is bound by law to support his wife. If he is a wage earner although she has no legal title to his wages, she has an interest in the right use of them. If there are such risks

of his making an improper disposition of them by assigning them to secure the payment of money that he borrow for unnecessary purposes as to justify the Legislature in limiting and regulating his exercise of this right, might they not regulate it by requiring the consent of his wife as a pre-requisite to the validity of his assignment? A strong argument can be made in favor of the plaintiff's contention on this point. But on the whole we are of opinion that the Legislature might look chiefly to the ordinary relations between husband and wife under the law and adopt this form of regulation as salutary in its application to most members of the class with which they are dealing."

The reasoning of the court in the foregoing case is persuasive. The husband or wife has an interest in the proper use of the wages of the other; and the marital relations are such that we can not say that the legislative provision for regulating the assignment of salary or wages by a borrowing husband or wife is plainly in conflict with the Constitution, or invalid.

Applying the foregoing holding of the validity of the act to the cases under consideration—

(1) In the Cain case, the demurrer is not well taken and sustained.

(2) In the Sharpe case, we find no error in the record, and the judgment is affirmed.

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Jones Law Petition.

SUFFICIENCY OF PETITION UNDER THE JONES LAW.

Common Pleas Court of Cuyahoga County.

**IN THE MATTER OF THE PETITION FOR THE PROHIBITION OF THE
SALE OF INTOXICATING LIQUORS IN A CERTAIN RESIDENCE
DISTRICT IN THE CITY OF CLEVELAND.***

Decided, December 2, 1911.

*Intoxicating Liquors—Prohibition of Sale of, in a Residence District—
Nature and Character of the Proceeding—Hearing Need Not Necess-
sarily be Before the Same Judge Who Received the Petition—Method
of Procedure—Rights of the Majority—Hearing Delayed More than
Forty Days—Statute Directory and Not Mandatory as to Time—
Burden of Proof as to Sufficiency of Petition and as to Fraud in
Procuring Signatures—Prima Facie Evidence as to Sufficiency—Pe-
tition Need Not be Addressed to Mayor or Judge by Name—Omission
of Location of a Saloon from Map—Sections 6140 et seq.*

1. The proceedings growing out of the filing of a petition for the prohibition of the sale of intoxicating liquor in a residence district are judicial in character; and where such a petition is presented in the common pleas court of a county where there are several judges, it should be filed in the miscellaneous room, and after having been received by the judge presiding in that room, it should be given a regular number and advanced on the trial docket for hearing within forty days and then referred to the assignment commissioner to be set by him for hearing before whatever judge happens at the time to be not engaged.
2. When a petition either to prohibit or to permit the sale of intoxicating liquor in a residence district is presented to the court or the mayor, and the petition is found to be correct in form and properly filed, it must be accepted as *prima facie* evidence of its sufficiency; and the burden is upon the contestants to show that there are among the signers persons who are not qualified electors or were not residents of the district at the time of signing the petition. 11 C.C. (N.S.), 351, not followed.
3. Sections 6140 and 6141 are not inconsistent with Section 6149, General Code, and changes in population since the last regular municipal election can not be permitted to interfere with the provision found in Section 6149.
4. It is not necessary in such a case that the petition be addressed to the mayor by name or to a particular judge of the common pleas

* Affirmed by the circuit court.

court, but it is sufficient if it is filed with the mayor or a judge within three months of the signing thereto of the first names procured.

5. The opening of a new saloon within the prescribed territory after the signatures to the petition were obtained but before the hearing thereon, does not cause the map attached to the petition and which does not show the location of such saloon to be open to objection; but objection does lie to a map which failed to show the location of all the saloons within the prescribed district at the time the petition was sent out for signatures.
6. A signer who asks to have his name stricken from the petition on the ground of fraud or misrepresentation must establish such fact by a preponderance of the evidence, and testimony offered in that behalf will be closely scrutinized.

Chas. M. Earhart, for petitioners.

G. E. Hartshorn and *G. W. Shaw*, contra.

FORAN, J.

This cause was heard on the 18th day of October, 1911, in court room No. 3. Inasmuch as the petition was received on the 7th day of July, 1911, it will be seen that more than forty days elapsed from the receipt of the petition until the hearing thereof. Therefore a brief history of the matter may not be out of order.

On the 7th day of July, 1911, the judge before whom this action was heard happened to be in Room 1 on private business, when he was approached by certain gentlemen with the petition in question, and asked to receive it under the statutes. The judge said to these gentlemen that he was not on duty that day, and referred them to the judge who was then presiding in room No. 1. The gentlemen, however, said that the judge then presiding in room No. 1 was busy, and had referred them to the judge who received the petition. The petition was therefore received as of July 7th, 1911, as a petition to prohibit the sale of intoxicating liquors as a beverage in a residence district in the city of Cleveland, Cuyahoga county, Ohio, and the petition bears this data:

"Presented to M. A. Foran, Judge Common Pleas Court, on the 7th day of July, 1911. Filed with me this 7th day of July, 1911, at 3 o'clock P. M." Signed, "M. A. Foran, Judge."

The first question that arises in this case is: what is the nature and character of the matter itself?

In *Valentine v. City of Boston*, 37 Mass., 201, it is said, "An action, in the ordinary use, is simply a legal demand of one's right." And in the 77 Pa., 480, it was said that "A suit or action, according to its legal definition, is the lawful demand of one's right in a court of justice."

A proceeding, as defined by Black, is as follows:

"In a general sense, the form or manner of conducting judicial business before a court or judicial officer. In a more particular sense, any application to a court of justice." *Ex parte McGee*, 54 Pac., 1091; 33 Oregon, 165.

The question naturally arises, is this a judicial proceeding, or is it an action?

In *Supervisions of Onondaga v. Briggs* (N. Y.), 2 Daniel, 26, it is said that "a judicial act is the performance of a duty which has been confided to judicial officers to be exercised in a judicial way"; and in *Smith v. Strother*, 8 Pac., 852, it was said that:

"A judicial act is an act done by a member of the judicial department of government in construing the law, or applying it to a particular state of facts presented for a determination of the rights of the parties thereunder."

It can not be said that this is a ministerial act, for the word "judicial" is used ordinarily in two senses, the first to distinguish such bodies or officers as have the power of adjudication upon the rights of persons and property. In the other class of cases it is used to express an act of the mind or judgment upon a proposed course of official action as to an object of corporate power, for the consequences of which the official will not be liable, though his act was not well judged; as differing from a ministerial or physical act of an official for which, if negligently done, he or his superior will be held to answer. See 68 N. Y., 88-97.

Section 6140 of the General Code provides that a petition of this kind may be presented to the mayor of a municipal corporation or judge of a court of common pleas, and no matter whether it is presented to a mayor or judge, the section provides that the person to whom it is presented shall examine the petition at a

public hearing, and decide upon the sufficiency thereof; that is, the mayor or judge is to hear and determine the sufficiency of the petition and pass judicially upon its sufficiency, that is, determine whether it complies with the law, or whether it does not comply with the law. In other words, the officer to whom it is presented must determine whether the facts stated in the petition are sufficient; and if a contest arises with respect to its sufficiency, the judicial officer to whom it is presented must determine and distinguish between the truth and the falsity of the contest or claims of the parties who make the contest; therefore it must be a judicial act. This becomes all the more evident from the provisions of Section 6152 of the General Code, which provides that the judge shall cause his findings or decision "to be recorded in the records of his court," that is, in the journals of the court of common pleas. The statutes do not provide that there shall be kept a special journal in which these proceedings are to be recorded, and it is therefore quite evident that the law provides that a record of all acts and findings of the judge of the court of common pleas in relation to these petitions shall be recorded in regular journals of the court of common pleas, and this can not be done unless the petition is docketed as any other cause or action begun in the court.

It was in this sense that the petition was received on July 7th, 1911. It was set for hearing by the court who received it, for the 25th day of July, 1911. It appears of record that on that day Mr. Shaw and Mr. Hartshorn appeared for certain contestants who were opposing the granting of the prayer of the petition, and that Mr. Earhart appeared for the petitioners; and that, by consent of these attorneys, the hearing was postponed until the 2d day of August, 1911, at 10 A. M. On the 2d day of August, 1911, the same parties appeared in court, and the matter was again postponed by the consent of the parties, until the 18th day of September, 1911.

At the hearing on October 18th, one of the counsel for contestants, in open court, made the statement that on August 2d, when the matter was continued until September 18th, the judge who entered the continuance by consent of the parties said that the matter having come up during the summer term of court

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he did not feel that Room 1 should hear it, or that it should be heard in that room, and therefore fixed the date for hearing on September 18th, 1911.

With all due deference and respect for the distinguished gentlemen who was presiding at that time in Room 1, I must dissent from this view.

Paragraph C of Rule 28 of the rules of the court of common pleas of this judicial district reads as follows:

“The July term shall be a special term, open for the transaction only of such business as may be done by a judge out of term time, for the granting of judgments by default, under the rules providing therefor, and all other matters that are *specially urgent*.”

Section 6152 of the statutes under which this proceeding is brought provides that the mayor or judge shall cause a certified copy or certificate of his finding, together with the original petition, to be filed with the clerk of the municipal corporation or council not less than five days after such finding, and not more than forty days from the filing of the petition with him. Although it has been held that this section is not mandatory in cases where it is impossible to comply with it, yet it is clearly apparent that the Legislature intended that a finding should be made, if possible, within forty days from the time the petition was filed with the court or with the mayor; therefore the matter was one of special urgency, and should have been heard in Room 1 during the summer term, especially as the forty days expired August 16, 1911, thirty-three days before the fall term opened. It was clearly a case that comes within the rule already cited, and of such special urgency that it should have been heard. But, as has been stated, the case was continued until September 18th, 1911, on which day the fall term of the court of common pleas of this judicial district opened.

On the 18th day of October, 1911, when this case was being heard, one of the counsel for contestants stated in open court that the judge presiding in Room No. 1 on September 18th, 1911, held and decided that the case could only be heard by the judge who received it.

Although this court has the greatest respect for the legal ability, judicial integrity and gentlemanly courtesy of the judge then presiding in Room No. 1, he respectfully dissents from this view.

It must be conceded that this is a judicial hearing; that it is an action in court, whether that court be a mayor's court or a court of common pleas; and simply because the statute, Section 6152, uses the words "such mayor or judge shall decide the questions raised by the contestants," it can not be judicially said, or properly said, that only the judge or the mayor who received the petition must hear it. Section 6151 also uses the same words, that is, "such mayor or judge"; but the fallacy of the reasoning upon which the opinion is based, that the judge who received the petition must hear it, can be readily seen when we take into consideration the fact that this is an action, and that it does not abate by the death of either the judge who received it or any of the petitioners. Suppose the judge who received the petition resigned or died before the cause was set for hearing, or was incapacitated by sickness or out of the country, can it be said that the action or the right of the petitioners abated? Certainly not. Of course a mayor's court is a court of limited jurisdiction, and, so far as civil jurisdiction is concerned, the jurisdiction of a mayor is confined to the limits of the municipal corporation of which he is mayor, and therefore it may be truly said that the mayor of any other corporation could not hear the petition; but if the mayor who received the petition resigned, became disabled, or unable to hear the case when it was reached in its order, or suppose he died in the interim, can it be said that the action would abate or that the right of the petitioners would cease and determine? Might not the mayor who succeeded the mayor who received the petition, in case of his death or resignation, hear this petition? We are certainly of the opinion that he not only could, but that it would be his duty to do so. We are certainly of that opinion, and so decide, that is, if this petition had been presented to the mayor of the city of Cleveland on the 7th day of July, and if within forty days thereafter the mayor resigned or died, whoever took his position by authority of the statutes and the laws of the state of Ohio, as mayor of

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the city, would have a right, and it would be his duty, to hear and determine the questions involved in this petition.

These matters are referred to simply for the reason that we believe some fixed and determined method of procedure should be followed in these cases; and we believe, and so hold, that these petitions, when they are presented to a judge of the court of common pleas, should be presented, in this county at least, in Room No. 1, and received by the judge in that room, that is, the judge then presiding in that room; that the proceeding or action should then be given its regular number on the appearance docket by the clerk of the court, and then advanced on the trial docket in Room No. 1, by the judge therein presiding, for hearing within the forty days prescribed by the statute; and when so advanced, the case should be then referred to the assignment room, and, when reached, sent by the assignment commissioner to whatever room he sees fit to send it, or to whatever court was not then engaged or whatever room was open to hear it at that time.

This action arises under what is known as local option laws of the state. Local option means the determination, by vote of the people of a town or other minor political community, as to whether or not any licenses to sell intoxicating liquor shall be granted. This is a principle of law well established in most of the states of the Union, and it is advocated in all of the states. The principle has also been recognized in England and other foreign countries. The principle is based upon the right of the majority to rule, and is the cardinal principle of every democratic or republican form of government. A democracy is a government in which the sovereign power of the state is vested in the people as a whole, and is exercised as directed by them or their elected agents. Mr. Locke has well said: "The majority, having the whole power of the community, may employ that power in making laws and executing these laws; and when that is done, there is a perfect form of democracy." Following the etymology of the word, democracy means government by the people, in other words, the *vox populi*. In a democracy or a monarchy there necessarily must exist anarchy or order. There must be either chaos or a master; and in a republic or a de-

mocracy we recognize the majority as the master, and this master must be obeyed.

These local option laws recognize the right of the majority. Those who favor the right to traffic in intoxicating liquors in a residence district are by these laws given the right to say so; and by one of the sections of this statute, after a territory has been declared dry, or after the sale of intoxicating liquors has been prohibited in a residence district for the space of two years, a majority of the qualified electors of that district may then petition the court to permit the sale of intoxicating liquors in that district; and if the people of the district in which the sale of intoxicating liquors has been prohibited can secure a majority of the qualified electors of the district permitting the sale of intoxicating liquors in that district, that sale must be permitted. So that those who are in favor of the sale of intoxicating liquors in a residence district have the same right, if they form a majority of the qualified electors of the district, as those who are in favor of prohibiting the sale of intoxicating liquors in that district.

It is true that a majority sometimes oppresses; that is, if unrestrained, a majority may become as much of a tyrant as the greatest despot, or, as it is stated differently, "Man in multitude may sometimes become as great a tyrant as man in unitude." But if we are to have a democratic or republican form of government, we must recognize the master, that is, the majority; and if this majority sometimes goes wrong, as it undoubtedly does, we must wait until an enlightened public conscience corrects the evil. Montesquieu said:

"Government is like all other things in the world: to preserve it, it must be loved. No one ever heard it said that kings do not love monarchy, or that despots hate despotism."

A republic or a democracy can be no exception to this rule. To establish a republic or a democracy in a country, it does not suffice, nor is it necessary, that a minority desire it, or even wish to impose it. There must be a majority of republicans or democrats as willing to receive it as capable of upholding it. It is true that sometimes the majority oppresses the minority, and it

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is equally as true that sometimes the minority governs the country or the majority through terror. These things can not be avoided, and they may be blessings in disguise, for when the majority, through mere force of numbers, or the minority through force of terror, go too far, the public conscience is aroused, and the pendulum which was swinging too far either way again vibrates or swings normally.

The laws of this state provide for local option in counties, townships, municipal corporations, and residence districts of municipal corporations. It is with these latter that we have to deal here.

Section 6141 of the General Code provides that the decision of the mayor or judge, as certified to the clerk or council and recorded by him in the records of the council of a corporation, or a certified copy thereof, provided it shows that a majority of the voters of such residence district were in favor of the prohibiting of the sale of intoxicating liquors as a beverage, in the same residence district, and file the same with the mayor or judge, and if such petition is found sufficient, the sale of intoxicating liquors in that residence district may be permitted. So that it will be seen that, after all, it is a question of the right of the majority of the qualified electors of a residence district to say whether or not intoxicating liquors shall be sold in that district; and if a majority decide that intoxicating liquors shall not be sold in the district, or if a majority decide that intoxicating liquors may be sold in the district, the minority has no right to complain.

Upon the hearing of this case, Mr. Schwartz, an attorney for one N. C. Guarniers filed a motion asking that the petition be dismissed, for the reason that there had been no judicial finding upon the petition within forty days after the same had been filed with the court. This motion, as well as a similar motion filed by Mr. Wertschafer in behalf of Stephen B. Ringholz, was overruled, and the court now sees no reason why he should depart from his decision in that respect. To say the least, these motions were not, in the opinion of the court, filed in good faith. These contestants, or the attorneys representing them, did not appear on July 25th, 1911, when this case was set for hearing.

Section 6151 of the General Code provides that when such a petition is filed with the mayor or judge, notice of the hearing of such petition shall be published in two newspapers of opposite party politics, published in such municipal corporation, if there be two, and the notice or publication must stipulate the time and the place where such judge or mayor will consider the petition. It does not appear from the record that the two contestants making the motions to dismiss, just referred to, appeared on July 25th, or at any time thereafter, and that they first appeared on the 18th day of October, 1911, and for the purpose of making these motions only. It seems to the court that it was the desire of these contestants to take advantage of any error that might occur, without being financially responsible in any way as contestants.

Our own circuit court, in the matter of the hearing before the Honorable Tom L. Johnson, mayor of the city of Cleveland, and known as Opinion No. 4512, rendered November 1, 1909, said this:

"A further claim was made that the mayor was without jurisdiction to hear the petition, because more than forty days had elapsed from the time of its filing before such hearing was had, and this is based upon the language of the statute, which is that 'such mayor shall cause a certified copy or certificate of his findings, together with the original petition, to be filed with the clerk of the municipal corporation or council, not less than five days after such finding, and not more than forty days from the filing of the petition with the mayor.'"

After thus citing the statute, the circuit court of this judicial district states:

"There can be no doubt that this language is directory only, and not mandatory. To hold otherwise would put every petition filed by either those desiring to prohibit or those desiring to prevent prohibition, in peril, because if the mayor were unable to hear the petition within the time directed, by reason of his health, by reason of other duties, or for any other reason that would prevent his hearing the same, the petition would absolutely go for naught."

The same reasoning given by Marvin, J., in this case applies with equal force to the opinion or the view of the judge in Room

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1, when he decided that the court who received the petition was the only one who could hear it; and for the very evident reason that if the court who received the petition should become incapacitated by reason of sickness, or if he should die, or resign, the petition and the prayer of the petitioners would absolutely, go for naught, as our circuit court well said.

One of the main objections raised to this petition by the contestants is, that the burden of proof is upon the petitioners to establish the sufficiency of the petition. This contention is based upon a decision found in 30 Circuit Court Reports, 697 [11 C.C. (N.S.), 351], by the Circuit Court of Hamilton County, the syllabus of which reads as follows:

“A petition under the Jones residence local option law, requiring a public hearing by a mayor or judge, is not *prima facie* evidence of its sufficiency, except upon failure of any electors of a district to contest it; and the burden of proof rests upon the petitioners to prove such facts; but if an elector seeks to withdraw his own or authorized signature from the petition, he has the burden of establishing fraud or misrepresentation by which it was secured.”

Martin, J., in a decision rendered in the Court of Common Pleas of Montgomery County. March 10, 1908, disregarded this opinion of the Circuit Court of Hamilton County, and refused to follow it, and said:

“The courts of this county have always held in all cases, whether the petition was filed either by the wets or by the drys, that a petition which is correct in form and properly filed in court establishes a *prima facie* case in favor of the petitioners.”

We think this reasoning is the correct one, and on every one of these petitions it is stated by the signers that they are qualified electors of the district in which it is sought to prohibit the sale of intoxicating liquors. The questions involved in a matter of this kind are not only ethical and social, but, unfortunately, to some extent political, and this is recognized by the Legislature, for it is provided in the statute that the hearing must be had before the mayor of the municipal corporation in which the residence district is said to be located, or a judge of the county in

which the municipal corporation is located, showing very conclusively that the question of locality was considered by the Legislature. It must be admitted that environment has considerable to do with all things, and, unfortunately it has sometimes something to do with judicial decisions; and this court prefers not to follow the decision of the Circuit Court of Hamilton County, for obvious reasons.

In this connection, however, we desire to say that we believe the burden is on the petitioners to show the number of electors who voted at the last municipal election in the proposed residence district. The board of elections has been doing this by certification to the judge or mayor who received the petition, or the court where the proceeding was pending; but the statutes do not require the board of elections to do this. The books or records of the board of elections may, however, be brought into court in the usual way.

Martin, J., said further that he preferred to follow the rule laid down in Montgomery county, which relied for its authority upon the decision rendered by Judge Wildman of the circuit court of whose jurisdiction Lucas county is a part. It may be said, in passing, that Judge Wildman held, that where nothing had been done to indicate that the district, as an entirety, does not comply with the requirements of the law to constitute a residence district, it is subject to the provisions of the law.

The court rendering this opinion prefers to follow the views of Judge Martin and Judge Wildman, and in doing so we simply desire to say that any other holding or finding would render the local option law an absolute nullity.

The law provides that a residence district may contain as few as 500 qualified electors, and not more than 5,000 qualified electors. Suppose we had a residence district of about 5,000 qualified electors, and suppose that 3,000 of those electors sign a petition praying that the sale of intoxicating liquors be prohibited in that district, is it to be said that the prayer of this petition shall not be granted unless each and every one of them is subpoenaed and brought into court to testify under oath that he is a qualified elector, that he resides within the district, and has

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resided in the district for the period required by the statute? It will be seen at a glance that such a holding would make it absolutely impossible to prevent the sale of intoxicating liquors in any residence district. If every man who signs a petition to prevent the sale of intoxicating liquors in a residence district must be subpoenaed into court to testify under oath that he did sign the petition, that he is a qualified elector, that he resides in the district, and at the place or number and street indicated in the petition, the time consumed in hearing such a petition would be interminable. And therefore we hold that when a petition, whether it be to prevent the sale of intoxicating liquors in a residence district, or to permit the sale of intoxicating liquors in a residence district, is presented to a court or to a mayor, and the petition is found to be correct in form and properly filed, the burden is then upon the contestants to establish the fact that those who signed the petition are not qualified electors and do not reside in the district, or have not resided in the district the time required by the statute. Any other holding would be a self-evident absurdity and a contradiction.

It is said, however, by the contestants, that Section 6140 provides that whenever a majority of the qualified electors of any residence district of any municipal corporation sign a petition in favor of the prohibition of the sale of intoxicating liquors as a beverage in such residence district, and then take certain other action, certain results shall follow, and that the following Section, 6141, provides that the decision of the mayor or judge, as certified to the clerk of the municipal corporation or council, and recorded by him in the records of the council of the corporation, or a certified copy thereof, provided it shows that a majority of the voters of such residence district were in favor of prohibiting the sale of intoxicating liquors as a beverage, shall be *prima facie* evidence that the selling and furnishing and giving away of intoxicating liquors as a beverage, or the keeping of a place where such liquors are for sale, open, or given away, if such selling, furnishing, or giving away, or keeping of such place open occur thirty days after the finding of such mayor or judge, was then and there prohibited and unlawful; and that Section 6142 pro-

vides that whenever a majority of the qualified electors of any residence district of any municipal corporation in which the sale of intoxicating liquors as a beverage has been prohibited, under the provisions of Section 1 of this act, shall sign a petition against prohibiting, etc.

These sections are cited for the purpose of showing that it is incumbent upon the petitioners to prove that a majority of the qualified electors of the residence district signed the petition before the judge or mayor; and they say that the succeeding section, that is, 6149, is inconsistent with these sections, for the reason that it reads as follows:

"The petition provided for in this act shall be deemed sufficient when it is signed by as many qualified electors as equal a majority of the number of votes cast at the last regular municipal election in such residence district, but must, in order to be valid, be filed not later than three months after the signing thereto of the signatures first in order of time."

In passing upon the question as to whether or not these sections are inconsistent, it must be remembered that population can, under no circumstances, be said to be a fixed quantity or factor. On page 11, Volume 1, of *The American Anthropologist*, it is said: "The limits of population revolve more and more within the sphere of man's material, mental and moral freedom." In other words, population increases faster in certain districts than it does in others, owing to man's material, mental and moral freedom, and population decreases in certain districts faster than it does in others because of the lack of man's material, mental and moral freedom.

From the time a petition of this kind is started until it is filed, the law provides that a period of three months may elapse. Now, during this period, the population of the district, or the number of qualified electors, may increase or diminish materially; and there is no means of determining whether the number of qualified electors in a residence district, say, on the first of April, 1911, is greater or less than the number of qualified electors on the first day of July, 1911. Therefore some standard had to be established by which it could be determined what was a majority

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of the qualified electors necessary to either prohibit the sale of intoxicating liquors in a residence district, or to permit the sale of intoxicating liquors in such district; and the standard established is found in the section just quoted, that is, Section 6149 of the General Code; and that standard is, that the petition, either to permit or to prevent the sale of intoxicating liquors in a residence district, must have attached thereto the names of qualified electors equal to a majority in number of the votes cast at the last regular municipal election in such residence district. We think it is a fair standard; in fact we do not know of any other fairer standard, or any other standard that could be adopted. There is no practical standard except this standard. And we further hold that if the petition was presented to a mayor or a judge, and received and filed by either a mayor or judge on the day next preceding a regular municipal election, the mayor or judge would not be governed by the votes cast in the residence district covered by the petition at the municipal election following the receipt and filing of the petition, but by the votes cast in that district at the regular municipal election next preceding the filing and receipt of such petition, that is, the regular municipal election held before such receipt and filing of such petition. And to say that it would be incumbent upon petitioners, at the time of the hearing, to show that there was attached to the petition names sufficient to constitute a majority of the number of qualified electors in the residence district at the time the petition was filed, would be vain and foolish, because it would be utterly impractical to prohibit the sale of intoxicating liquors in a residence district or permit the sale of intoxicating liquors if such a requirement had to be complied with. So that the standard established by Section 6149 of the General Code is the only standard, in the opinion of the court, that could be practically established and followed.

The first objection to the petition by the contestants is, that it is insufficient in form, because it is not addressed to the mayor or to a judge of the court of common pleas.

Section 6141 of the statutes provides that the petition must be filed with the mayor of the municipal corporation or with a

judge of the court of common pleas of the county in which the municipal corporation is situated.

We do not believe, and so hold, that the petition need be addressed to the mayor or to a judge of the county in which the municipal corporation is situated, before it is actually filed with such mayor or such judge. If the petitioners expected to present it to or file it with the mayor of the city of Cleveland, Ohio, they might have so addressed it to him, but it was not mandatory that they should do so.

Section 6149 of the General Code provides that they might file it any time within three months after the signing thereto of the signatures first in order of time. After the signing of the first signature in order of time, the petitioners had three months within which to secure the required number of signatures, and they had no means of knowing the mayor would be in the city or be in such state of health to receive it when the required number of signatures was obtained. It would have been idle to have addressed it to him during the time they were procuring the signatures. The same reasoning applies with equal force to the name of a judge in Cuyahoga county. As has been already stated, this petition should have been presented or filed with the judge in Room 1; and while the signatures were being secured they had no means of knowing just what judge would be in Room 1 when they were ready to file it. It is true they might have filed it with any judge of the Court of Common Pleas of Cuyahoga County, Ohio, but as the three months did not expire until the summer vacation began, how were they to know before they were ready to file it just what judge would be in Room 1 or in the county. This objection is frivolous, and will be overruled. All the petitioners were required to do was to present the petition to the mayor or to the judge in Room 1, any time within three months after the signing thereto of the signature first in order of time; and when the petition was presented within the time prescribed by statute, to either the mayor or a judge, neither the mayor nor the judge to whom it was presented had any option in the matter. Neither the mayor of the city of Cleveland nor a judge of Cuyahoga county, Ohio, could refuse to receive and file it without being guilty of misfeasance in office.

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A judge has no more right to refuse to receive such a petition than he would have to refuse to receive a petition asking for an injunction, or to refuse to grant the injunction if the petition made a case. And when so received and filed by the mayor of the city of Cleveland, or by a judge of Cuyahoga county, Ohio, it could be heard within forty days thereafter by the mayor of the city, whether he was the man who received and filed it or not; and if it was presented to a judge of the Court of Common Pleas of Cuyahoga County, it could be thereafter heard by any judge of the Court of Common pleas of Cuyahoga County, Ohio. The words in the statute, or the several statutes. "such mayor or such judge." refer to the official and not to the man.

The second objection is that the petition does not contain a correct description of any residence section whatsoever. In this respect we find the petition sufficient, and the objection is overruled. The evidence clearly shows that the description of the residence district contained in the petition comes clearly within the requirements of Section 6068, General Code.

So far as the objection that the map attached to petition 22 is defective, in that it does not show the location of all the saloons in the district, we think the objection is well taken, and should be sustained. The evidence seems to indicate that about June 1st, 1911, a new saloon was opened in this district. All the other maps, or the maps attached to the other petitions, except the map attached to petition 22, show the location of this saloon. Section 6146 provides that all petitions for signatures shall have a map or drawing attached showing the outlines of the district and the location of all saloons within the proposed district. There are four signatures on petition 22. If the saloon omitted on this map was opened or started after these signatures were secured, the objection would be overruled, for if the opening of a saloon after the signatures were obtained would render a petition or petitions void, the very object of the law could be defeated and destroyed and rendered nugatory by the mere starting or opening of a saloon shortly before the petitioners were ready to file their petition. But as the signatures on this petition No. 22 were obtained or secured on July 3, 1911, a month after this

saloon was opened or established, it seems only fair that the map attached to this petition should show the location of that saloon. It may have been a mere oversight, but we think this section of the statute mandatory, and these four names will be stricken from the petition.

Objection No. 4, that the petition was circulated for more than three months prior to the filing thereof, will be overruled. The testimony of Mr. Fleming, that he signed the first petition on April 10, 1911, and that his signature was the first attached to any of the petitions, is clear, decisive and uncontradicted.

Certain of the signers testified that they were induced to sign the petition through fraud and misrepresentation. Section 6149 of the General Code provides that no person shall be allowed to withdraw his signature, unless he can prove it was secured through fraud and misrepresentation. We hold that the burden is upon any person seeking to withdraw his signature; to prove the fraud or misrepresentation. If signers were permitted to withdraw their names after having signed the petitions or authorized their names to be signed thereto, the object of the law would be defeated and destroyed, for the pressure by those opposed to the petition would become so great that many would be induced to withdraw if they could. Hence, before such withdrawals will be permitted, the law requires them to show their signatures were procured or secured by fraud and misrepresentation; and when a signer seeks to have his signature withdrawn because of fraud or misrepresentation, the court will not be unmindful of the fact that he is not acting wholly upon his own initiative. In other words, there arises a suspicion that such signer has been importuned by some interested party to request that his signature be withdrawn, and testimony along that line will be closely scrutinized. He must prove the fraud and misrepresentation by a preponderance of the evidence, and his evidence in that behalf will be subjected to close and rigid analysis. During the hearing we struck off six names, mainly on this ground. Since then we have carefully read the testimony on this point, and see no reason to change the conclusions then reached. The names stricken off appear in the bill of exceptions, or the record, and need not be repeated here.

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The contention that this residence district contains a block, within the meaning of Sections 6161 and 6069 of the General Code, is not sustained by the evidence. Indeed the evidence clearly indicates that there is not in this residence district a block or territory bounded by four well-recognized adjacent streets containing a block one-half or more of the foot frontage of which is occupied by buildings and premises actually devoted to commercial, mercantile, manufacturing or other business purposes, not including saloons. This contention or objection of the contestants is therefore overruled.

The case then stands as follows: The number of votes cast at the last municipal election before this petition was filed was 981. The petitioners must have on their petitions as many qualified electors as equal a majority of 981, or 491. The petitions as filed show 565 signatures. It is agreed by counsel that 56 of these names or signatures should be stricken off, and this leaves 509 signatures on the petitions. The court ordered, at the termination of the hearing, that six more names be stricken off; the four signatures on petition 22 are also stricken off, making a total of ten stricken off by the court. Deducting these ten signatures from 509, it leaves 499, or 8 more than a majority of the votes cast in this district at the last municipal election before the petition was filed.

The court therefore holds that the petition is sufficient, and the clerk of the courts is ordered and directed to certify to the Clerk of the City of Cleveland, Cuyahoga county, Ohio, the findings and decision of this court, to be by said clerk recorded in the record of the city of Cleveland, Cuyahoga county, Ohio.

To all of which the contestants except.

APPLICATION OF STATUTE OF LIMITATIONS TO ACTION OF SURETY PAYING HIS PRINCIPAL'S DEBT.

Common Pleas Court of Hancock County.

I. N. ELSEA v. FRANK PEPPLER.

Decided, January Term, 1912.

Reimbursement of Surety—Action For, Barred by the Statute of Limitations at the End of Six Years, When—Nature of the Action—Promissory Note Paid by Surety—Assignment of Note—Section 11222.

A surety who pays his principal's promissory note when due, has a cause of action against him for reimbursement. And where the note is not in judgment and is independent of any security, lien or preference, the action in favor of the surety rests upon the implied promise of the principal to save him harmless in the premises, and is barred in six years under the provisions of Section 11222 of the General Code, notwithstanding the note has been assigned to the surety by the payee.

Raymond H. O'Brien, for plaintiff.

John E. Priddy, contra.

DUNCAN, J.

This action is brought by a surety against his principal on a promissory note to recover from him the amount he paid thereon. The case was heard upon demurrer to the petition, pleading the statute of limitations. The petition was filed December 4, 1911, and recites that the parties executed their certain promissory note to the Farmers National Bank of Findlay, Ohio, on October 7, 1899, on which the plaintiff was surety and the defendant principal, though not so designated, whereby they and each of them promised to pay said bank the sum of \$100 in ninety days from that date with interest at 8 per cent. after maturity, and that the plaintiff paid said note in full on January 6, 1900, and took an assignment thereof from said bank. Also, that said note has been presented and no payments made thereon; and judgment is prayed for.

From this statement the defendant was the real debtor, as between him and the plaintiff. It was the duty of the defendant,

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therefore, to pay the note when due and save the plaintiff harmless in the premises. To this end an implied promise arose between them that the defendant would pay the note when due, but if he did not and the plaintiff paid it, that the defendant would reimburse him therefor. Hence, upon the failure of the defendant to pay the note and the payment thereof by the plaintiff, a cause of action accrued in favor of the latter to recover from the defendant, the amount so paid. *Williams v. Williams*, 5 O., 444; *Neal v. Nash*, 23 O. S., 483; *Poe v. Dixon*, 60 O. S., 124.

This right, as said, being upon an implied promise, is subject to the limitations of Section 11222, General Code, which provides that:

“An action upon a contract not in writing * * * shall be brought within six years after the cause thereof accrued.”

This conclusion is warranted by the general principles declared in the following cases: *Williams v. Williams*, 5 O., 444; *Neilson v. Fry*, 16 O. S., 552; *Neal v. Nash*, 23 O. S., 483; *Zuellig v. Hemerlie*, 60 O. S., 27, 29; *Poe v. Dixon*, 60 O. S., 124.

The fact that the bank assigned the note to the plaintiff when it was paid does not extend the period of limitation within which suit must be brought. The defendant's liability to the plaintiff was created by the latter's payment of their joint note on which, as between them, they were principal and surety, respectively. And thus, by the payment of the note by the one, the obligation against both was extinguished and another arose in his favor against the other, not on the note, but upon the implied promise, as already explained. It was a joint and several note, and when paid as to one, it was paid as to both, and being paid, the bank had nothing to assign. It has been held, however, that the note is kept alive as between the principal and surety so as to permit a suit thereon by the surety who pays it, notably in *Texas (Sublettis, Admr., v. McKinney*, 19 Texas, 438; *Tutt v. Thorton*, 57 Texas, 35). But the Supreme Court of Ohio in commenting on this holding in *Zuellig v. Hemerlie*, 60 O. S., 27, 33, says:

“This doctrine that a surety who has paid a note or other security may sue upon it directly in an action at law we think is in

conflict with the weight of authority and with principle. His remedy is upon the implied contract of indemnity."

This contention is also supported by *Camp v. Bostwick*, 20 O. S., 337, 345, where it is held that the surety's right of action is based upon this implied contract and accrues when he pays the note and continues for six years, even though the statute has run against the note. If, therefore, the remedy is upon the implied contract when there is no assignment, how could it become express by an assignment? The principal must have been a party to the assignment in order to work this change, and it must also have been in writing in order to extend the limitation.

This rule is not in conflict with the holding in *Dempsey v. Bush*, 18 O. S., 376. There was a judgment in that case and against the principal and sureties as such. The sureties paid it and the court simply held that they were subrogated to the rights of the judgment creditor, that is to say, to the security which the judgment afforded. The same in *Hill v. King*, 48 O. S., 75, where it was held that the same rule obtains whether the surety has been certified in the judgment or not. Also in *Zuellig v. Hemerlie*, 60 O. S., 27, where it was held that the surety who pays the debt may be subrogated to the creditor's rights in a mortgage given as additional security. The exact question here presented has not been decided in Ohio, but it is argued in support of the plaintiff's contention that the same principle which entitles the surety to be subrogated to the rights of the creditor in securities for the debt applies with equal force to the debt itself. This argument is without either reason or authority where the debt is independent of any security, constitutes no lien or carries no advantage to the surety in the enforcement of payment. The right of action in favor of the surety is based upon the implied promise, as already explained, and not upon subrogation. The one is the right itself and the other is position or advantage in which the surety may stand or with which he may act to the end that the right may be enforced, and for that purpose only equity resorts to the fiction that the debt is still alive. The one is the debt itself while the other is but an incident to it and pertains exclusively to the remedy by which payment may be enforced, and each is subject

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to its own limitation. *Kerr v. Lydecker*, 51 O. S., 240; *Bradfield v. Hale*, 67 O. S., 316.

Since the criticism of the two Texas cases by the Supreme Court of this state in *Zuellig v. Hemerlie*, 60 O. S., at page 23, to which I have called attention, the Supreme Court of Texas in *Faries v. Cockrill*, 88 Texas, 428 (28 L. R. A., 528; 31 S. W., 190), has overruled both of said cases in a case involving exactly the point here, after a careful and extended review of all the authorities. The court, drawing the distinction made here, among other things says:

“From a careful examination of the authorities we reach the conclusion that when the creditor has no security from either of the payors, and the debt itself holds no lien upon property, nor is for any reason entitled to priority over other debts of the debtor, the payment of the debt by a co-obligor or surety satisfies the original debt, and the party paying has his right of action against the others, upon the implied promise raised by law, for his reimbursement, according to their several liabilities. *Griffith v. Reed*, 21 Wend., 505, 34 Am. Dec., 267; *Copis v. Middleton*, Turn. & R., 228; *Bryant v. Smith*, 10 Cush., 169; *Pray v. Maine*, 7 Cush., 253; *Kennedy v. Carpenter*, 2 Whart., 344; *Hopkins v. Farwell*, 32 N. H., 425; *Singleton v. Townsend*, 45 Mo., 379; *Smith v. Johnson*, 23 Cal., 64; *Ward v. Henry*, 5 Conn., 595, 13 Am. Dec., 119; *Frevert v. Henry*, 14 Nev., 191; *Gieseke v. Johnson*, 115 Ind., 308; *Crisfield v. State*, 55 Md., 193; *Bushnell v. Bushnell*, 77 Wis., 435, 9 L. R. A., 411; *Chipman v. Morrill*, 20 Cal., 131; *Sichel v. Carrillo*, 42 Cal., 506; *Louvall v. Gridley*, 70 Cal., 510; *Penniman v. Vinton*, 4 Mass., 276.”

In the case at bar, the creditor bank had no security and the debt itself is not in judgment and has no character which makes it a lien of any kind or gives it any priority over other debts of the defendant, and hence the plaintiff is confined to his implied contract alone for his relief, and action upon this, as already explained, is barred by the statute of limitations provided for actions of that character, six years. The demurrer to the petition is sustained.

**POLICE SURVEILLANCE OVER ONE CHARGED WITH
PRACTICING USURY.**

Superior Court of Cincinnati.

MARY E. BORING v. HENRY T. HUNT, MAYOR, DENIS F. CASH,
DIRECTOR OF PUBLIC SAFETY, AND WILLIAM H. JACKSON,
CHIEF OF POLICE, OF THE CITY OF CINCINNATI.

Decided, March, 1912.

*Usury—Note Broker Collecting Usurious Interest Not Subject to Police
Surveillance—Injunction Lies Against that Method of Eradicating
Usurious Practices—Function of Courts of Equity.*

1. Injunction is a remedy for preventing the breach of the duty not to take an unwarrantable advantage of the process of law, a duty partly legal and partly equitable only; and here the remedy, an injunction, is primary.
2. Where the evidence shows that no criminal procedure is invoked, that trespasses are continuous, and, that, in order to obtain a remedy at law, a multiplicity of suits must follow, there is no adequate remedy at law, and equity will intervene.

Thomas Bentham, for plaintiff.

Alfred Bettman, City Solicitor, contra.

SPIEGEL, J.

The plaintiff has filed a petition in this court, alleging the official character of the defendants above named, and that she is a resident of Cincinnati, engaged in business here, in the usual course and conduct of which sundry persons call at her said place of business; that the aforesaid defendants, in their official capacity, have conspired together to injure her in her business and, in pursuance of said conspiracy, stationed on March 16th, 1912, a uniformed police officer in her place of business with instructions to interrogate persons visiting her place of business and otherwise interfering with the conduct of said business, all of which was done without invitation of plaintiff, and was without authority or warrant of law, and in violation of her constitutional rights to conduct her business; that she requested the defendants to withdraw the officer from her place of business

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and requested the officer to leave it, all of which was refused, whereupon she, in order to compel the officer to leave her premises, was compelled to close her place of business, but that the officer then proceeded to stand and patrol in front of the door of her place of business; that she reopened her business on March 18th, 1912, but that the officer again stationed himself therein, and that the defendants threaten to continue him there indefinitely; that thereby the defendants, in violation of plaintiff's legal rights, have assumed to exercise arbitrary and autocratic authority without warrant of law, and will thereby imperil and destroy her said business to her great and irreparable injury, and that she is without adequate remedy at law. Upon this state of facts plaintiff prays that a temporary, and upon final hearing, a permanent restraining order may issue out of chancery, restraining each of said defendants, their agents or servants, from in any wise intimidating, molesting or interfering with plaintiff in her said business, in any of the ways alleged in her petition.

A number of other petitions, containing similar allegations, were filed in this court. No answer was filed to any of them.

The court did not grant a temporary restraining order, but set this case for final hearing on the day following.

Upon the hearing the following state of facts developed: The 79th General Assembly passed an act (Vol. 102 Ohio Laws, page 469), a similar ordinance of the city of Cincinnati having been declared invalid, that no person, firm or corporation except banks and building and loan associations shall engage or continue in the business of making loans upon chattels or personal property of any kind whatsoever or of purchasing or making loans upon salaries or wage earnings without first having obtained a license so to do from the Secretary of State. The act further provides for the details of such borrowing and lending, interest not to be charged in excess of 8 per cent. per annum, and a fee not to exceed 10 per cent. of the sum borrowed to be charged for examination, collection and all other charges. The violation of a provision of this act, or the carrying on of the business without a license, entails a fine of not less than \$50 nor more than \$200, for the first offense, and not less than a fine of

\$200 or more than \$500, and a revocation of the license to do business for the second offense.

Where usurious interest has been charged, this act adopts the only law upon our statute books upon the subject of usury (Section 8300, Revised Statutes), namely, that the usurious payments shall be credited on account of the principal, or may be recovered in a civil suit, and no judgment be rendered against the borrower in excess of the principal borrowed and still due.

The mayor testified that numerous lenders of money had refused to comply with the new act, that the matter had become a crying evil, and that he believed, that in the exercise of his functions as chief executive, exercising his discretion, the power was vested in him to do what the petition charges him with doing. He admitted that the petition stated the facts correctly, and that he had no knowledge that the plaintiff violated the act just quoted, but that he intended to obtain the evidence through the police officers, whom he had stationed in the different loan offices, and ordered to take the names of the visitors, and interrogate them concerning the purpose of their visits. That in some instances he had withdrawn the officers, when the lenders permitted his experts to examine their books and records, to determine whether they had complied with the law; that in the case at bar, however, he had no knowledge whether any offer to permit such examination had been made by the plaintiff or not.

The plaintiff testified to the facts as stated in her petition, which are not disputed, that she was not engaged in the business of loaning money upon chattels or other personal property, nor in purchasing, or making loans on salaries, but that she was a note broker, taking notes only, charging 10 per cent. per month interest, but that her losses about equalized her income to a 6 per cent. per annum basis.

Her counsel, Mr. Bentham, testified that on behalf of his client, the plaintiff, he offered permission to the director of public safety to make an examination of her books and records, in order to substantiate her statements as to her business, that the officer might be withdrawn, but that his offer was not accepted, and the officer remained.

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That is the state of facts developed on the trial.

Two questions present themselves to the court: First, has the mayor, and with him, his subordinate officers, overstepped the powers vested in him; and, second, if so, is this a case where the duty is cast upon a court of equity to interfere?

These questions are not new, and have had the attention of both the law and equity courts. Judge Story, in his work on Equity Jurisprudence, lays down this rule of guidance for equity courts (Vol. 2, page 263):

“It may be remarked in conclusion upon the subject of special injunctions, that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course; for it is improbable to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. The jurisdiction of these courts thus operating by way of special injunction is manifestly indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence. At the same time, it must be admitted that the exercise of it is attended with no small danger both from its summary action and its liability to abuse. It ought, therefore, to be guarded with extreme caution and applied only in very clear cases; otherwise, instead of becoming an instrument to promote the public as well as private welfare, it may become a means of extensive and perhaps irreparable injustice.”

And on page 204, quoting Mr. Justin Baldwin in *Bonaparte v. Camden & Amboy R. R. Co.* (1 Baldwin's Cir. R., page 218), the following rule is laid down:

“There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity that never ought to be extended unless to cases of great injury, where courts of law can not afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction. But that will not be awarded in doubtful cases, or new ones not coming within well-established principles; for if it issues erroneously, an irreparable injury is in-

flicted for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured or great and lasting injury about to be done by an illegal act. In such a case, the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act. We know of no rule which excludes from this process any person over whom the court has jurisdiction on account of the character or capacity in which he acts, although it is conferred upon him by a law of a state or of Congress."

Bearing these rules in mind, and especially the rule "that an injunction will not be awarded in doubtful cases, or new ones not coming within well-established principles," let me examine the legal question involved. It is a well-established principle of equity that courts of equity have no criminal jurisdiction, and will, therefore, not interfere by injunction or otherwise, to stay proceedings in any criminal matter. It is urged that the case before me falls under this rule. The evidence, however, shows that the plaintiff, while transgressing the law which makes the legal form of interest in Ohio 6 and 8 per cent. per annum, for the transgression of which a civil remedy is given by our statutes, has not been guilty of a crime, and has not violated the provisions of the act of 1911, for she does not loan on chattel property or salaries. Where, then, is there any proceeding in any criminal matter? And; if not, by what authority does a police officer take possession of her place of business, or the corridor in front thereof? Counsel for the city cites to me the case of *Delaney v. Flood*, 183 N. Y. R., page 323, wherein the Court of Appeals of New York holds that equity will not interfere to restrain police authorities from stationing officers outside a place having a liquor tax certificate, when such authorities suspect that place of being conducted as a disorderly house, and from notifying customers who are in the place and those who are about to enter the same that it is a disorderly house which is likely to be raided at any moment, and that those who are on the premises at the time of such raid, are liable to arrest, and that the proprietor of the place, if oppressed or injured by any unlawful act of the authorities, may invoke Section 556 of

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the New York Penal Code, or he may maintain an action of law for damages.

The city solicitor cites this isolated case as an authority for his claim that the mayor has the power which he exercised in the case at bar, and the plaintiff's only recourse is an action at law for damages, no penal action being provided in our state. Let us hear what the New York court says in its opinion (page 329):

"Such a situation as is presented in the case at bar is one which, in its very nature, can not be adequately dealt with by a court of equity. What might be a trespass at one instant of time may be a perfectly justifiable and necessary act at another. Here lies the fundamental distinction between the case at bar, and that class of cases in which equity assumes jurisdiction to restrain trespasses that are continuous or permanent in their nature, and where such relief is necessary to obviate multiplicity of actions at law and to prevent continuity of wrong."

And that is the distinction between the case before me and the case cited. Here are continuous trespasses, involving civil rights and property rights, none in obedience to the criminal law, or in furtherance of criminal procedure. It is an old rule of equity jurisdiction that its aid will be extended to prevent continuous trespasses, where, to obtain relief at law, a multiplicity of actions would become necessary. There the remedy at law would not be adequate, and the injuries sustained, before even inadequate relief at law could be obtained, would become irreparable. This has also been recognized in New York, where in the appellate division of the Supreme Court of said city in *Burns v. McAdoo*, 113 App. Div., 165, *McGorie v. McAdoo, Id.*, 271, and *Hagan v. McAdoo, Id.*, 509, the decision in *Delaney v. Flood* has not been followed, but distinguished upon the ground that it has no application to cases where the police are not engaged in the enforcement of the criminal law but have gone outside the law and procedure and become common trespassers, and the court allowed injunction against the illegal actions of the police authorities. In accordance with what I have said, the case before me is, therefore, one where it becomes the duty of a court of equity

to lend its aid to a petitioner where personal rights as well as property rights are claimed to have been invaded by a public official. In further support hereof, I cite Judge Story (Equity Jurisprudence, Vol. 1, p. —):

“The question has been made, how far a court of equity has jurisdiction to interfere in cases of public functionaries who are exercising special public trusts or functions. As to this the established doctrine now is that so long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority.”

The facts before me, undisputed, clearly show an invasion both of the plaintiff's property rights as well as civil rights. The Bill of Rights, an integral part of the Constitution of our state, as well as the Bill of Rights of every state of our Union, contains as the fundamental principle of our civic liberties, certain provisions. Sections 1 and 14 of our Bill of Rights read as follows:

“Sec. 1. All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.”

“Sec. 14. The right of the people to be secure in their persons, houses, papers and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath of affirmation, particularly describing the place to be searched and the person and things to be seized.”

The city solicitor enlarges upon the evil, which the mayor is endeavoring to eradicate. Granted, but, nevertheless, has the Machiavellian rule of statesmanship that the end justifies the means, whether legal or illegal, become a maxim of our juris-

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prudence? I hope not. And I can not state the modern rule of law more clearly than was done by Justice Wm. J. Gaynor, the present mayor of the city of New York, in *Cullen v. Bourke*, 93 N. Y. Suppl., page 1085 (Supreme Court Reports of the city of New York), the syllabus of the case reading as follows:

“Where a captain of police for several days kept policemen stationed in plaintiff’s store, and caused a patrol wagon to stand in front, and to be driven up and down, with a loud ringing of the bell, and policemen on the outside called out to those offering to enter that it was a suspected pool room and they might be arrested if they entered, and no arrests were made or warrant issued, a permanent injunction will issue to restrain such trespass.”

And, in rendering the decision, Judge Gaynor laid down the rule as follows:

“It is said that the conduct of this defendant (the police captain), arises from his virtuous zeal against the injurious vice of betting on horse races in private. He seems to be wholly unaware, and not informed by his official superiors, that the vice of arbitrary power which he indulges in is a far worse vice, and far more dangerous to society and to our system of government, than the vice of betting. It brings in its train a horde of vices, and especially the despicable vices of oppression, extortion and blackmail. If this captain of police is to be permitted to go on doing at will what he has done to this plaintiff, he can extort money throughout his precinct, and get rich thereby, just as police officials have done in the past in the city of New York, as we all know, for the proof of it has been matter of public record for several years. The safety and morals of the community require that all public officials should respect the law, and keep within the law prescribing and limiting their powers. The only way to preserve law and order in the community, and administer the criminal law, is the way prescribed by the law.

“It may be that this plaintiff is addicted to the vice of betting on horse races, a vice publicly practiced on five or six race tracks within the limits of the city of New York, and that he allows such betting to be privately practiced on his premises. If so, the way of the law toward him is perfectly plain. It is also effective. The way and the command of the law is that evidence of the fact be first obtained, and that thereupon he be arrested, convicted and imprisoned. Such a course would beget a wholesome respect and fear of the law, and even a few convictions

would be effective to lessen the number of secret betting places; whereas lawless spectacular raids not only degrade the law but do no good. To obtain such evidence the police force has a detective or secret service force.

"If it be asked, 'what is to be done if no evidence can be obtained?' the answer of the law is emphatic, 'do nothing.' The law does not permit even a murderer to be molested without evidence. The meaning of free government is that no one may be molested or arrested except in the way prescribed by law. Upon this alone, does free government rest. This is well understood everywhere outside of the city of New York except in archaic despotisms such as Russia. Where officials do as they like, free government does not exist. Ours is a government of law, not of men. Russia is a government of men, not of laws."

A permanent restraining order, in accordance with the prayer of the petition, may be taken against the defendants.

NOTE.—Since the decision of the case, the following entry, agreed to by both the city solicitor and counsel for plaintiff, has been entered on the court records:

"This cause coming on this day to be heard upon the petition of the plaintiff, the evidence and the arguments of counsel; on consideration whereof the court finds the equities of the case are in favor of the plaintiff.

"It is, therefore, considered and decreed that the defendants, and each of them, are hereby perpetually enjoined from stationing in the plaintiff's place of business uniformed police officers of the city of Cincinnati and from trespassing on said premises, and from preventing, or attempting to prevent persons visiting her place of business.

"It is further considered that plaintiff recover from the defendants her costs herein expended, taxed at \$——."

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Pritz v. Railway.

FATAL INJURY AT A RAILWAY CROSSING.

Common Pleas Court of Hamilton County.

ALBERT PRITZ, ADMINISTRATOR, v. PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.

Decided, February 10, 1912.

Negligence—Passenger on Electric Car—Fearing Collision with Railway Train, Jumps and is Fatally Injured—Proximate Cause—Next of Kin.

1. The fact that the petition in an action for damages on account of wrongful death does not disclose all of the next of kin does not afford ground for a motion by the defendant for a new trial.
2. A court can not apportion negligence as between persons or agencies either in degree or as to time, but must accept the finding of the jury in that behalf where based upon the evidence and circumstances of the case.

*Littleford, James, Ballard, Frost & Foster, for plaintiff.**Maxwell & Ramsey, contra.***O'CONNELL, J.**

Opinion on motion for new trial.

Plaintiff as administrator of the estate of Henry Graf, deceased, brought suit against the defendant company for his alleged wrongful death. The petition mentioned as the beneficiaries the widow of the deceased and his two minor children.

The deceased was a passenger on a street car, who, believing that the car was about to be struck upon a crossing by an approaching train, jumped from the car and was killed by the train.

The jury on the issues joined, found for the plaintiff assessing the damages at \$10,000.

In support of his motion for a new trial, counsel for defendant submits two separate phases of the case:

1st. That the evidence shows that the petition does not disclose all the next of kin.

2d. That the evidence shows that the negligence charged against the defendant was not the proximate cause of the injury.

Section 10772, General Code, provides that an action such as this shall be brought in the name of the personal representative of the deceased, and damages are to be awarded "to the persons respectively for whose benefit the action is brought."

The action is properly brought, it being in the name of the accredited personal representative.

I can find no warrant for granting a new trial on motion of a defendant irrespective of the merits of the case, and in spite of the fact that a defendant may be shown by the evidence to be clearly liable, such motion being based on the sole ground that the plaintiff did not mention all the next of kin in his petition.

It is true that the plaintiff's evidence suggests the probability that there are, or at one time may have been other children of the deceased by a former marriage in addition to those mentioned in the petition, but whose whereabouts are at present unknown. The omission to mention such in the petition is not fatal. The statute provides that the suit shall be brought by the personal representative. This has been done. There is no other form of procedure under which a defendant can be held to answer for a wrongful death. Hence, no other suit can be brought because of this death. An heir, at present unknown, aggrieved at not sharing in the proceeds of such suit, can not himself sue the company. Only the personal representative can do that. Such heir appears to be without remedy as against the defendant, who under the statute is answerable only to the personal representative. No prejudice has been done the defendant by alleging that the decedent left a widow and two children, instead of possibly three or four children. There is no jurisdictional failure in this regard on the part of the plaintiff to mention all the next of kin who may be conjectured to be in existence, and the court holds that this ground for the motion for a new trial is not well taken.

The defendant raises the further issue that the failure of the employe of the defendant to lower the safety gates was the remote cause of the accident, and the negligence of the traction company the direct or proximate cause.

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The evidence is uncontroverted that the gates were not lowered, they being situated some hundred or more feet from the track, although the train was past due; and that the way being thus unobstructed the street car, by reason thereof, proceeded eastwardly.

There is evidence tending to show that the employees of the street railway company were negligent in the operation of the street car. But the court can not apportion the negligence, either in degree or as to the time when the negligence was most harmful.

The question as to whether the negligence of the defendant's watchman in the tower, or the negligence of the street railway's conductor, was the direct and proximate cause of the accident, was one of fact for the determination of the jury. It is not one which the court, as a matter of law, is given authority to decide.

The motion for a new trial should therefore be overruled.

INFORMALITIES IN PROCEEDINGS FOR ABOLISHING GRADE CROSSINGS.

Common Pleas Court of Cuyahoga County.

F. W. CALDWELL v. CITY OF CLEVELAND ET AL.

Decided, May 15, 1911.

Grade Crossings—Ordinance for the Elimination of—Failure to Name in the Ordinance Certain Streets Upon which Dangerous Crossings Exist—May be Cured by a Supplemental Ordinance—Enlargement of Existing Overhead Crossing within the Scope of Grade Crossing Improvements—Provision Limiting Time for Preparing Plans May Be Waived.

1. Inasmuch as a mere informality in the passage of an ordinance, or the omission of some preliminary step required by law, may be cured by a supplementary or amendatory ordinance, subject to any intervening rights, the proceeds from an issue of municipal bonds, authorized for the purpose of abolishing grade crossings, may be applied so far as necessary to the elimination of crossings of streets not specifically named in the original ordinance, where these streets are within the scope of the grade crossing improvement as fully

understood at the time the issue of bonds was authorized, and the omission has been remedied by specifically naming these streets in a supplemental ordinance as within the improvement.

2. Where a high railway embankment crosses a street, and this embankment has been pierced at the street intersection by two parallel tunnels of a size to permit the passage of a single vehicle at a time, outbound travel being accommodated by one of the tunnels and inbound travel by the other, and the facilities thus afforded are inadequate and passage through is attended with some danger, a general plan for the elimination of dangerous grade crossings includes within its scope authority to remove these tunnels and substitute therefor a bridge which will span the street and afford greater facilities and increased safety for the travel passing thereunder.
3. The provisions of Sections 8876 and 8877, requiring the preparation of plans within a limited period after the passage of an ordinance for abolishing dangerous crossings, is directory and not mandatory, and is a provision which may be waived by the parties for the purpose of giving more time for preparing the plans and for other purposes.

FORAN, J.

This is an action in which the petitioner, F. W. Caldwell, asks the court to enjoin the city of Cleveland and R. Y. McCray, as clerk of the council of the city of Cleveland and as the city clerk of the city of Cleveland, for reasons stated in his petition. He says that he is a tax-payer, and that on or about the 3d day of May, 1911, he requested the city solicitor of said city, in writing, to bring this action, and that said city solicitor failed and refused to do so.

For his cause of action plaintiff says that on the 9th day of June, 1902, the council of the city of Cleveland passed ordinance No. 37,941, an ordinance requiring the preparation of plans for the abolishment of grade crossings; that by the terms of said ordinance the Lake Shore & Michigan Southern Railway Company, operating a steam railroad passing through the city of Cleveland, was required, within six months after the passage of the ordinance, in co-operation with the engineer of said city, to prepare and submit to the council plans and specifications for the abolishment of grade crossings on its road, the ordinance describing such crossings as "all grade crossings on its road within the city limits."

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2. That on June 3, 1910, the council of the city of Cleveland adopted a resolution declaring it necessary to issue bonds of the city of Cleveland for the purpose of defraying the city's portion of the cost of abolishing railroad grade crossings of streets and highways; that by the terms of said resolution the question of issuing and selling said bonds was submitted to the vote of the qualified electors of the city, at a special election held on the 22d day of July, 1910; that said resolution provided how the question of whether such bonds should be issued be submitted to said qualified electors; that on the 20th day of June, 1910, the council of said city adopted a resolution respecting said special election and the issuing of said bonds, in which resolution it was provided that bonds to the sum of \$2,000,000 should be issued to defray the city's portion of the cost of abolishing railroad grade crossings of streets and highways; and in this resolution some twelve or fifteen of such crossings are specifically named, and among the crossings so named are the crossings at Lake avenue and Madison avenue of the Lake Shore & Michigan Southern Railway Company.

That on June 21, 1910, this resolution was published in the *Cleveland Leader*, a newspaper of general circulation in said city; and that, in addition thereto, banners were placed and strung at the various crossings named in said resolution, including the crossings at Lake avenue, N. W., and Madison avenue, N. W., of said Lake Shore & Michigan Southern Railway; that these banners declared, in substance, that if said bond issue carried at said election, the grade crossings over which said banner was strung would be abolished.

3. That on July 22, 1910, the special election provided for in the foregoing resolution was duly and regularly held, two-thirds of the voters of the city of Cleveland voting at said election voting in favor of the issuing of said bonds; that on or about the 6th day of September, 1910, and pursuant to the vote and action of said electors, the council of the city of Cleveland, two-thirds of the members concurring, duly and regularly passed ordinance No. 18,650, providing for an issue of bonds in the sum of \$2,000,000, for the purpose of paying the city's portion of the cost and expense of abolishing railroad crossings of streets and highways in said city; that it was provided in said last mentioned ordi-

nance, that it was deemed necessary to issue and sell these bonds. as therein provided, to pay the said city's portion of the cost of abolishing said railroad grade crossings, in which said ordinance and crossings to be so abolished were specified by name, but the crossings of Lake avenue, N. W., and Madison avenue, N. W., where the Lake Shore & Michigan Southern Railway crosses said avenues, were not specified nor in any way mentioned or referred to, but that said ordinance provided that the bonds to so be issued should be designated as "grade crossing bonds."

That prior to April 1, 1911, said bonds were duly advertised and sold according to law, and the proceeds thereof are now in the treasury of the city of Cleveland.

That said bonds provided that the said city of Cleveland's portion of the cost of abolishing certain railroad grade crossings specified therein, was to be paid out of the proceeds of the sale of said bonds, but that the crossings at Lake avenue, N. W., and Madison avenue, N. W., were not specified in any of said bonds, nor were they in any way referred to therein or thereon.

4. Plaintiff further says that the council of the city of Cleveland, on the 10th day of April, 1911, passed ordinance No. 20645a, which ordinance was entitled "An ordinance to supplement ordinance No. 18650," and was in effect what may be termed a curative ordinance, or an amendment to ordinance No. 18650.

In this curative ordinance it is said that "Whereas, by inadvertence and clerical error, crossings of the tracks of the Lake Shore & Michigan Southern Railway Company at Madison avenue, N. W., and Lake avenue, N. W., were omitted from said ordinance No. 18650"; and further, that, "Whereas the members of council voted for and passed said ordinance under the belief that the city's portion of the cost of changing the grades of the tracks of said railway company and said streets, and separating the same at the crossings last aforesaid, was provided to be paid from the proceeds of the sale of said bonds," * * * therefore the ordinance provides:

"Be it ordained by the council of the city of Cleveland, state of Ohio, two-thirds of all the members thereof concurring, that the city's portion of the cost of separating the grades of the railroad tracks of the Lake Shore & Michigan Southern Railway Company * * * at Madison avenue, N. W., and Lake

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avenue, N. W., and changing the grades of said streets and tracks by raising and lowering or relocating the same, shall be paid for from the fund created by the sale of bonds issued under authority of ordinance No. 18650, passed by this council September 6, 1910; and that said funds shall be held subject to and as appropriated for the payment of the city's portion of the cost of separating and changing the grade of said railroad tracks and said streets, as aforesaid."

In other words, this supplementary ordinance No. 20645a in effect shows an attempt to cure the defect or inadvertence in ordinance No. 18650 by providing that the funds created from the sale of said bonds might be used for the relocation or the changing of the grades of the streets at Madison avenue, N. W., and Lake avenue, N. W., by either raising, lowering or so relocating the same as to minimize the danger to the public in crossing the Lake Shore Railroad at these points, either above or below grade.

5. That on or about the 1st day of May, 1911, the council of the city of Cleveland passed a resolution declaring the necessity, and the intention of the city, to alter and abolish the crossings of the Lake Shore & Michigan Southern Railway Company at Lake avenue, N. W., and Madison avenue, N. W., and to lower the grades of said avenues below the tracks of said railway company, and to require the Lake Shore & Michigan Southern Railway Company to construct ways or crossings that are to be passed under its tracks, and to require said railway company to erect permanent piers or abutments or other appropriate supports in said streets and avenues, and specify the terms and conditions under which said improvements shall be made in accordance with the laws provided therefor.

And the plaintiff says that the defendant, R. Y. McCray, as clerk of the city of Cleveland and as clerk of the council of the city of Cleveland, is about to publish said last mentioned resolution in accordance with the law, and is about to proceed to serve notice upon the owners of abutting property, as provided for in said resolution.

Plaintiff further says that the action and proceedings of the council of said city, as hereinbefore set forth, are contrary to law, and will result in a misapplication of the funds of said

city of Cleveland, and are and will be an abuse of its corporate power, and are in preparation for the execution and performance by said city of Cleveland of a contract in contravention of the laws governing said city in three respects, to-wit:

(a) That the city is attempting to use the funds of said corporation derived from the proceeds of said bonds sold under authority of ordinance No. 18650, for the purposes and improvements set forth in the resolution of said city passed on the 1st day of May, 1911; and that such use of said funds is illegal in that the crossings of Lake avenue, N. W., and Madison avenue, N. W., were not specified in said ordinance No. 18650, nor in said bonds; and that said ordinance No. 20645a is ineffective to supplement or to remedy omissions in ordinance No. 18650.

(b) That the crossing of Lake avenue, N. W., and the railroad of the Lake Shore & Michigan Southern Railway Company is not a crossing at grade, and therefore is not within the meaning and terms of the act of May 2, 1902, found in 95 O. L., 356-359, and all amendments thereof and supplementary thereto, because the tracks of the Lake Shore & Michigan Southern Railway Company at said Lake avenue, N. W., cross said avenue overhead upon a stone tunnel bridge containing two passages; and further, that the plans and specifications agreed upon by the city engineer of the city of Cleveland and the Lake Shore & Michigan Southern Railway Company being for the purpose of substituting for said stone tunnel bridge a new steel and concrete bridge with pillars and piers upon the curb of said street and affording a wider roadway for travel and greater clearance, and the grade of said Lake avenue, N. W., under said plans, is to be lowered.

(c) That the resolution of the council of the city of Cleveland of May 1, 1911, above set forth, is illegal because the plans and specifications therein approved were not prepared and submitted to said council of the city of Cleveland or any engineer designated by ordinance of said council within six months, and a longer time was not mutually agreed upon, and said the Lake Shore & Michigan Southern Railway Company failed to so cooperate in the preparation of said plans and specifications, and did not furnish any such until they furnished the plans and specifications referred to and approved in said resolution of

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May 1, 1911; and that said plans and specifications so furnished were submitted without request therefor from said council of said city.

6. Wherefore the plaintiff prays the court to restrain and enjoin the defendant, R. Y. McCray, as clerk of the council of said city of Cleveland and as clerk of the city of Cleveland, from publishing the said resolution of May 1, 1911, and the defendant, the city of Cleveland, from using or attempting to use the proceeds of the bonds of said city sold under authority of ordinance No. 18650 for the purposes and improvements set forth in the resolution of said city council of May 1, 1911, and especially from using the proceeds of said bonds for the changes and alterations at Lake avenue, N. W., provided for in said resolution.

Plaintiff also prays that the city be restrained from executing or entering upon the performance of any contract or contracts provided for or incidental to the improvements specified in said resolution of May 1, 1911, and for such other relief to which he may in equity be entitled.

It will be seen from this statement of the case that three questions are presented:

First, can the city of Cleveland use the money created by the sale of these bonds for the purpose of altering and abolishing the crossings at Lake avenue and Madison avenue?

Second, it being admitted that tracks of the Lake Shore Railroad now pass over Lake avenue on a tunnel bridge, beneath which said Lake avenue traffic is carried on, can this crossing be altered and changed as provided for in the resolution of May 1, 1911, under the provisions of the General Code, Section 8874 *et seq.*?

Third, it being admitted that the plans for these improvements not having been prepared and agreed upon within the six months period provided by the ordinance of June 9, 1902, can the same be legally followed and adopted by the prosecution of these improvements?

As to the first question presented, it may be sufficient to say, that it is admitted in the petition of the plaintiff that all proceedings taken with respect to the altering or abolishing or eliminating of railroad crossings, with Lake avenue and Madison avenue

included, were regular, with the exception that ordinance No. 18650, above referred to, does not specify by name that the crossings at Lake avenue and Madison avenue shall be eliminated or abolished, altered or improved; and that the bonds which were issued to provide money for the elimination and abolishing of railroad grade crossings do not state upon their face that any of the proceeds of said bonds shall be used for the elimination, alteration or abolition of the Madison avenue or Lake avenue crossings.

It will not be denied that the money raised by the issue of bonds provided for in ordinance No. 18650 was legally raised, and that the bonds themselves were legal; but the contention is, that no portion of the fund thus raised by the sale of these bonds can be used for the elimination, alteration, abolition or improvement of the crossings at Lake avenue or Madison avenue.

In the case of *The United States Trust Company v. The Village of Mineral Ridge*, 44 C. C. A., 218 (104 Fed., 851), the question here raised was directly presented. It appears that refunding bonds were issued by the village of Mineral Ridge, purporting to have been issued by authority of Section 2701, Revised Statutes of Ohio, and containing a recital that they were issued to take up prior bonds, etc., "as provided in the ordinance of said village." It was held that such reference to the ordinance was not a compliance with the requirements of Section 2703 of the Revised Statutes of Ohio (1536-284), which provides that all bonds issued under the provisions of the chapter "shall express upon their face the purpose for which they were issued, and under what ordinance"; and inasmuch as the bonds provided that they were issued "as provided in the ordinance of said village," the specific ordinance not being named, it was held that such a reference to the ordinance was not a compliance with the section of the statute herein quoted.

In view of this decision, it may be said that, inasmuch as ordinance No. 18650 failed to specifically name therein Madison avenue and Lake avenue, and that the bonds provided for by the ordinance also failed to name these crossings, such ordinance or such bonds—or, rather, the proceeds derived therefrom—may not be used to eliminate, alter, change or improve the crossings at Lake avenue or Madison avenue. But it will be noticed that

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the petition itself alleges that a curative ordinance was passed on the 10th day of April, 1911, and is known as ordinance No. 20645a, which was an ordinance to supplement ordinance No. 18650, and was amendatory thereof. The petition, however, denies that this amendatory or curative ordinance is effective, and does not in fact cure the defect in the original ordinance No. 18650. We do not think this position well taken. In the elaborate work of John W. Smith on "The Modern Law of Municipal Corporations," it is held, Vol. 1, p. 514, Section 537 (s), that:

"It sometimes happens that an ordinance is within the scope of power, express or implied, granted to the municipality, but by reason of some informality in the passage, or of some other preliminary step prescribed by the charter not being taken, the validity as a binding contract is open to attack. In such case the ordinance may be rendered valid by a curative ordinance, subject, of course, to intervening rights."

The petitioner admits that the bonds issued under and by authority of ordinance No. 18650 are within the scope of power granted to the city of Cleveland by the statutes of the state of Ohio. If this be true—and the petitioner will not be heard to complain, because he admits that it is true—then a mere informality in the passage, or the omission of any preliminary step prescribed by law, may be cured or rendered valid by a curative ordinance, subject to any intervening rights. It does not appear from the petition that any rights have intervened since the passage of said ordinance, or that anybody will be affected or any person injured by the use of the funds created by ordinance No. 18650 for the elimination or the improvement of the crossings at Lake avenue and Madison avenue.

Harris on Municipal Bonds, page 166, says:

"The invalidity arising from irregularities in the proceedings or issuance (of bonds) may often be cured by subsequent acts of the duly authorized municipal officers, with the express permission or acquiescence of the tax-payers."

It must be admitted—at least it will not be seriously denied—that the members of the council are duly authorized municipal officers, and have the right to validate or render valid bonds

which are attacked for a mere omission or a mere irregularity in failing to state therein the names of two crossings among some twelve or fifteen that are to be eliminated. The money for the elimination or improvement of these crossings is on hand, and is now in the treasury of the city. The tax-payers, by the vote authorizing the issue of said bonds, expressly stipulated that these funds should be used for the elimination of all the grade crossings mentioned in the advertisement published in the *Leader*, as above stated, among which crossings will be found Lake avenue and Madison avenue.

In Section 421, page 870, of Reed on Corporate Finance, Vol. 2, the author uses this language:

"The court, in construing the statute of Indiana as to the purchase of a gravel road running through several townships, held that when an election is held in a number of townships, it having been ordered in response to a petition signed by the voters of all the townships, and a majority of the voters is in favor of making the purchase of the gravel road running through the townships, with a view to its becoming a free gravel road, it becomes the duty of the county commissioners of the county in which the townships are situated to make the purchase, and they then are authorized to issue bonds for the purpose, and levy a tax upon the citizen of the townships interested, for their payment."

And so in this case, the voters of the city of Cleveland, by a majority of two-thirds, as required by law, authorized the issue of bonds for the elimination, improvement or the abolition of the crossings at Lake avenue and Madison avenue, with a view to minimizing the danger to the public at these crossings; and the voters having so authorized the council to issue said bonds and raise said funds, it now becomes the duty of the council of the city of Cleveland to use said funds for the purpose intended by the voters at said election, the voters having been duly notified and fully understanding what said bonds were to be issued for, and what crossings were to be eliminated or improved by the moneys raised by the issue of said bonds.

The court therefore holds that this contention of the petitioner is not well taken, and that the city may legally and lawfully use the money which was provided for by the issuing and

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sale of bonds for the elimination and the improvement of the crossings at Lake avenue and Madison avenue.

It is admitted that all proceedings for the sale of bonds for the raising of this money were legal and regular. That being so, we know of no means by which the money can be paid back to the tax-payers; and if it can not be used for the purposes indicated in the advertisement preceding the election, it is difficult to understand what can be done with it, or what will become of it. Surely it may be said that the petitioner can not justly find fault with the use of the money as proposed by the city.

The next question raised by the petition is, that inasmuch as the tracks of the Lake Shore & Michigan Southern Railway Company now pass over Lake avenue on a tunnel bridge, through which Lake avenue runs, this crossing can not be altered or changed, as provided for in the resolution of May 1, 1911, under the provisions of the General Code, Section 8874 *et seq.*

It is provided in Section 8863 of the General Code, that if the council of a municipal corporation, in which a railroad or railroads and a street or other public highway cross each other at grade or otherwise, and the directors of the railroad company are of the opinion that the security and convenience of the public require alterations in such crossing or the approaches thereto, or that such crossing should be discontinued, with or without a new way or substitution therefor, and if they agree as to the alterations, they may be made as is provided in the following sections."

It seems to the court that the intention of the Legislature clearly was, that an alteration of a crossing of the character in question, or of the approaches, if the municipal corporation and the railroad company are of the opinion that the security and convenience of the public require alterations in the crossings or the approaches thereto, may be made as the statutes provide.

Section 8874 of the General Code provides that any municipal corporation may raise or lower, or cause to be raised or lowered, the grade of any street or way above or below railroad tracks, or require the railroad company to construct ways or crossings that are to be passed *under its tracks*; and the city may

require such railroad company to erect permanent piers, abutments, or other proper supports in the ways and crossings, streets, roads or alleys, whenever in the opinion of the council the same may be necessary.

About forty or fifty years ago the Lake Shore & Michigan Southern Railway Company, in extending its system westward from the union depot in the city of Cleveland, ran its tracks westward across the Cuyahoga river, practically parallel with the shore of the lake, until it reached a point westward about at the foot of what is now known as West 85th street, when the road or tracks diverged southward toward Detroit street, Rockport and Berea. Detroit street is a public thoroughfare running from the Cuyahoga river westward to Rocky river about one-half mile south of the shore of Lake Erie. This street is located upon an elevation or ridge that was perhaps formerly the shore of the lake itself. At all events, at the point where the Lake Shore & Michigan Southern Railway tracks cross Detroit street the land falls away sharply towards the north; and the railway company, in building its tracks from the shore of the lake southward towards Detroit street, did so upon an embankment which gradually rises from the shore of the lake until Detroit street is reached, this embankment attaining at Lake avenue and points between Lake avenue and Detroit street a height of between twenty and twenty-five feet. At the time the railway company constructed its line upon this embankment, the western boundaries of the city were a mile or two to the eastward of the embankment. When the city, owing to its increase in population and natural growth, extended its boundaries to this embankment and beyond, it surely had a right to cut streets through this embankment, or lay out streets running parallel with Detroit street and between Detroit street and the shore of the lake. In other words, the railway company could not, by constructing and building this embankment, prevent the city from extending its streets westward from its original boundary line through this embankment; that is, the railway company could not prevent the city from so extending its streets. And it will not be denied that if the railway company, by its conduct in constructing and building this embankment, prevented the free construction of streets westward from the

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boundary of the city, it will not now be heard to complain, if it is required by the city, when streets are cut through this embankment, to pay its portion of the necessary expense of extending such streets.

It is true that a grade crossing means a place where a highway or common road crosses a railroad on the same level; but it is a well-known fact that, for purposes of drainage, if not for purposes of grade, a railroad frequently raises its tracks above the surrounding territory several feet; and when the highway or common road approaches this railroad so raised, it must do so at a grade slightly raised from the horizontal. It is true that when it reaches the tracks or road, and the tracks are on a common level, the highway crosses the railroad at a level. A grade means the degree of inclination of a road as compared with horizontal. As has been said, if a railroad, by its own conduct, places an embankment across a stretch of territory which eventually is taken into a city or municipality, the city or municipality can not be prevented from extending its streets through this embankment; and we believe it was the intent of the Legislature, by Sections 8861 and 8874, to provide for just such a contingency. But be that as it may, in the year 1897, and between that year and 1899, the park board of the city of Cleveland, co-operating with the Lake Shore & Michigan Southern Railway Company, extended what is known as the Boulevard northward from Detroit street and through the embankment above specified; and at that time the Lake Shore & Michigan Southern Railway Company, co-operating with the park board, bore its share of the expense of constructing the approaches to this embankment, and in providing piers and abutments to protect the boulevard or highway as it passed through the embankment; and we think that by that conduct the railroad itself has placed a construction upon the laws relating to crossing which is conclusive so far as the issues now involved are concerned. At all events, I can not understand how a private citizen will be heard to complain of a matter of which the railroad itself is not complaining.

The crossing at Lake avenue is unquestionably one of the most dangerous crossing in the city of Cleveland. Lake avenue ap-

proaches the embankment at an acute angle, and what may be called tubular-arch roadways were constructed under the railway tracks through this embankment. These archways are about twelve or fourteen feet wide. Travel going westward passes by the right or northerly one of these tunnel archways, and travel going eastward passes also by the right but through the southerly archway. Street railway tracks are laid through these tunnel archways, and teams or pedestrians passing through them are in imminent danger of being run down by street cars or automobiles. Teams can not pass each other through either one of these tunnel archways. Teams approaching the embankment and passing by the right go through one of the separate tunnels; but if, through inadvertence or mistake, teams or automobiles should carelessly avoid the law of the road, there would be no way of preventing a very dangerous collision.

So that the alteration and improvement, or what may be termed the abolishment or the elimination, of this crossing is absolutely necessary. The money raised for the purpose of making the improvement ought to be, and in the mind of the court can be, used for that purpose.

There remains only the third question, and that is, where the plans for these improvements were not prepared or agreed upon within six months provided by the ordinance of June 9, 1902, can they be legally followed and adopted by the prosecution of the improvements.

It is undoubtedly true that the provisions of the statutes, Sections 8876 and 8877, General Code, requiring the preparation of plans within a limited period after the passage of the ordinance, are clearly directory, and are in no sense mandatory, so far as they concern any one except a railroad company and the municipality as the contracting parties. This provision as to the time of preparing plans is clearly for the purpose of fixing a reasonable time within which plans shall be prepared; and it is undoubtedly a provision which can be waived by the parties for the purpose of extending the time for preparing the plans, or otherwise. And as this is conceded by the plaintiff, we are at a loss to understand why he should complain. The railway company itself is not complaining in the matter; and

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indeed the petition admits that the railway company has prepared its plans, and is ready to go forward with the improvements, and has waived the provisions of the sections above referred to requiring the preparation of plans within a limited period of the passage of the ordinance.

For the reasons indicated, the demurrer to the petition will be sustained; to which the plaintiff excepts.

THE PROFESSIONAL STATUS OF MR. THATCHER.

Common Pleas Court of Lucas County.

IN THE MATTER OF CHARLES A. THATCHER.*

Decided, February, 1912.

Disbarment and Admission to the Bar—Extent to which an Order of Disbarment is Operative—Constitutionality of the Statute for the Relief of Thatcher—Why the Discretion of the Lower Courts Should be Controlled Thereby—Inherent Power of the Courts.

1. The order of disbarment in Thatcher's case in the Supreme Court, being based on inherent power and not upon legislative authority, is not controlled by the statute applicable to disbarment. Hence the order of disbarment of the Supreme Court does not operate as disbarment in any court of the state except the Supreme Court.
2. If admission and disbarment of attorneys be exclusively the exercise of judicial power, then the act of the Legislature providing that the order of disbarment entered in one court shall disbar in all courts is unconstitutional as an exercise of judicial power.
3. The act of the Legislature for the relief of Thatcher confers upon him the color of right to the office of an attorney. The court of common pleas should not, *sua sponte*, challenge the validity of the legislative act. Hence a proceeding instituted by the court to determine a question of constitutional law should be dismissed without deciding the question, when it appears that the decision is not necessary to determine a case before the court.
4. If the statute providing for disbarment is regulative and advisory, then its application is discretionary with the courts, and the act for the relief of Thatcher should control the discretion at this time.

* For majority opinion, see *ante*, p. 373.

JOHNSON, J.

Mr. Charles A. Thatcher was for many years previous to 1910 an active and prominent member of the Lucas county bar. In that year he was cited by the Supreme Court of the state, and, after hearing, was disbarred. At this (January, 1912) term of court, in a cause on trial before me, Mr. Thatcher took his place at the trial table and claimed a right to practice as an attorney in the cause. Upon objection to his appearance by the adverse party, consultation was had and the matter taken under advisement by the four judges of this subdivision. Thereupon the court ordered, on its own motion, that the matter of his right to practice be set down as a separate proceeding for consideration. Both the technical matter of the objection and the question of his right to practice must now be decided.

This statement of fact renders apparent that Mr. Thatcher deliberately chose to force a test of his rights at the trial of a case in my court room. Since I have become involved without choice of my own, I present an opinion on the facts.

Mr. Thatcher's right to the privilege of an attorney claimed by virtue of a statute passed for his benefit is denied upon the ground that the statute is an exercise of judicial power. The judicial power is vested by the Constitution in the courts. The exercise of judicial power is prohibited to the Legislature.

The invalidity of the legislative relief and the disbarment order of the Supreme Court are the two obstacles to Mr. Thatcher's appearance as an attorney of this court. He certainly can not appear as of course. If disbarred, he can not appear unless by the authority of the legislative act. The disbarment proceedings and the legislative act bearing upon Thatcher's present claim to appear as an attorney should be considered in reaching a decision.

The first paragraph of the syllabus in the case of Mr. Thatcher in the Supreme Court asserts, as the authority upon which the court proceeded in disbarment, that the Supreme Court of Ohio has inherent jurisdiction of proceedings to disbar an attorney, and that its inherent jurisdiction results as an incident to its organization as a court as well as from its power to admit to the

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bar. The second paragraph of the syllabus declares that the provisions of the Revised Statutes of Ohio, Section 563 (General Code, 1707, 8, 9, 10) are but regulative provisions recognizing this already existing power of the court.

Two elements, then, contribute to disbarment orders promulgated by courts of this state. The prime element is said to be the independent, inborn power arising out of vital necessity and indispensable to the existence and organization of the institution as a court. By this hypothesis this factor is an element and an attribute without which the court could not be a court. The second is the regulative element conferred by the Legislature.

The origin of authority or source of power must inevitably define the operation and the results consequent upon the exercise of such authority or power. This is so because the endowment of power can only operate and become effectual within the limits of its creation and existence—within its own proper sphere. Derivative power can not exist greater in scope, nor more efficient, than the authority from which it emanates. Inherent power signifies quality which exists by necessity and as a condition of existence. It is that without which the organization in which it abides could not be. Hence inherent power includes only such power as is co-extensive with the exigency and necessity from which it springs. It follows that the scope of inherent power in a court can not be extended beyond the absolute minimum necessary to maintain the existence and function of a court as a court. The Legislature may contribute power to the court, may enlarge its jurisdiction, and provide for the enforcement of the mandates of the court. The increase of power, however, gains efficiency and existence through statutes passed to that end. It derives nothing from the exigency of inherent power. It is a contradiction of terms to assert that an inherent power is subject to regulation except through the creator of the organism thus endowed. If the power exists native-born and of necessity, and as a condition of life, no co-ordinate organism can limit or regulate such power. It is irreducible because its maximum is the minimum of existence; its diminution is destruction. In the domain of the constitutional courts of this state, therefore, their inherent powers can be neither enlarged, changed nor dimin-

ished. Whatsoever is given by legislative grant is not inherent. Legislative regulation and control over inherent power vested in these courts is a contradiction in terms; is incompatible with the nature of such power; and is repugnant to assumption of inherency. By so far as the Legislature may add to or detract from the power of a court, by that far the power dealt with is not the inherent judicial power of the state of Ohio vested in the courts.

Our Supreme Court possesses original jurisdiction in quo warranto, mandamus, habeas corpus, procedendo and such other appellate jurisdiction as may be provided by law. It exists as a court created by the Constitution and invulnerable to legislative action in its constitution and original jurisdiction. The Constitution conferred no other original jurisdiction. In the Thatcher case the Supreme Court acted with original authority, not in an appellate capacity. The Thatcher case was neither quo warranto, mandamus, habeas corpus nor procedendo. Hence, as avowed in the syllabus, the authority for proceeding originated in necessity. The disbarment of Thatcher was deemed essential to preserve the court as a court. His existence as an attorney must have been conceived by the court as inconsistent with its existence as a court. To preserve itself, the court destroyed him. The Supreme Court, in a word, found that the privilege of Thatcher to be its attorney was irreconcilable with its existence as a court and that the existence of his privilege rendered impossible the proper fulfillment of duty by it in the sphere assigned for that court.

In this connection it must be apparent that the exigencies pertaining to the exercise of inherent power by the Supreme Court are not necessarily identical with the exigencies of the courts of common pleas. This distinction is expressed in the language of an ancient authority recognized in most of the courts in Ohio:

"All flesh is not the same flesh; but there is one kind of flesh of men, another flesh of beasts, another of fishes and another of birds. There are also celestial bodies and bodies terrestrial; but the glory of the celestial is one and the glory of the terrestrial is another. There is one glory of the sun and another glory of the moon and another glory of the stars, for one star differeth from another in glory." *1 Corinthians, Chap. 15, et seq.*

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Both courts are established by the Constitution of the state. Each court, therefore, is a separate and entirely distinct entity. Each is independent and has its sphere of action and existence. Hence the inference is plain that the judgment of the Supreme Court, acting by virtue of its inherent power, can not control the judgment of the courts of common pleas as to the exercise of their inherent power. Necessarily as between these two courts each has its own inherent power; to be determined by each court for itself in its own jurisdiction. The determination of the common pleas courts might be subject to review under legislative authority conferred in accordance with the Constitution. But whatever power be inherent, must exist as an attribute essential to the organization of the courts themselves, and incident to the obligation to maintain their own rules and administrative functions. Consequently a decision of the Supreme Court, where its authority to decide a given case rests upon inherent power, can not, from the very nature of inherent power, operate as a conclusive adjudication, binding upon the courts of common pleas, when the same facts come before the courts of common pleas. As to inherent power, the Supreme Court and the court of common pleas are independent and co-ordinate. Neither can by virtue of inherent power regulate or control the other. Where authorized by law, the Supreme Court has appellate jurisdiction. It has none where the right of appeal does not exist.

From these considerations it seems logically to follow that the order of disbarment entered by the Supreme Court, being based on inherent and not upon conferred authority, must be limited in its operation to the jurisdiction of that tribunal. It is avowedly an act of self-preservation on the part of that court. It was not an act for the preservation of the courts of common pleas. Hence, not only because disbarment in the courts of common pleas is not essential to the proper maintenance by the Supreme Court of its own function and existence; but also because the authority is not conferred upon the Supreme Court by the Constitution to disbar attorneys of the courts of common pleas; therefore the disbarment of Thatcher by that court, brought about through an original proceeding, does not disbar him in the courts of common pleas. That court is not the constitutional guardian

of the courts of common pleas. It may uphold its own authority, but it has no jurisdiction to destroy nor impair the judicial power of other courts of the state which derive their being from the Constitution. Hence if the court, from the exigency of its own situation, disbars an attorney in that court, the disbarment is not an adjudication in this court.

In the disbarment of Thatcher the inherent power of the court and legislative authorization must be clearly distinguished. because at this point in the argument the provisions of the statute may be invoked. The Legislature has enacted that "the Supreme Court, circuit court or court of common pleas may suspend or remove an attorney at law from the office for misconduct in office, conviction of a crime involving moral turpitude or unprofessional conduct involving moral turpitude. *Such suspension or removal shall operate as a suspension or removal in all the courts of the state.*" This statute is referred to by the Supreme Court as regulative of the inherent power. If it be true that the admission and disbarment of attorneys is exclusively an exercise of judicial power, if it be true that this subject-matter is withheld from the Legislature, how can it be that a legislative act can at all apply? Is it not the exercise of judicial power to extend the operation of a disbarment order to the several independent courts of the state when the right to enter such order is founded on inherent power? If it be an act of admission or disbarment, by the premises, it is judicial, and is void. If the Legislature be excluded from this field, it possesses no authority by which it may enact that a decree of one court based on inherent powers upon facts within its jurisdiction, shall be a decree of every court in all jurisdictions throughout the state. This, by the premises, would be the exercise of judicial power by the Legislature, and hence void. It inevitably follows that the power of admission and disbarment, not being conferred by statute, but inherent, can derive no authority from the Legislature—which, by the premises, can not admit or disbar.

In this very proceeding this court holds that the act of admission or disbarment of an attorney is exclusively judicial power. If this be so, then the act of the Legislature disbarring an attorney of a constitutional court of independent jurisdiction, is as-

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surely an exercise of judicial power; especially if the original disbarment was brought about not through legislative authority. The legislative enactment provides that disbarment of an attorney in one court shall disbar in all courts. The disbarment order in the Thatcher case is the exercise of inherent power. Is not the Legislature then by this enactment laying hold of and attempting to apply inherent power invoked and used by the Supreme Court? If the Legislature can not control and direct the inherent disbarring power, then whatever authority is enactment possesses flows from legislative power. Then if the act disbars, which is judicial power, whence came the disbarment? For there is no perceptible difference between the quality or logical character of an assertion that the act of the Legislature operates to disbar an attorney in all courts where disbarred by one; and of an assertion that an inherent power which the Legislature can not control does by force of statute control tribunals to which by its own nature and authority the inherent power does not extend. If attorneys are thus disbarred, it is the act of the Legislature which disbars, and not the courts. This, according to the premises in the case, can not be so.

The Legislature can neither enlarge nor diminish the inherent power of the Supreme Court, because it can give nothing nor take away anything in the exercise of original jurisdiction nor inherent power. Taking, then, as a premise that the power to admit and disbar attorneys is exclusively judicial power and that legislative action thereon is void, the conclusion inevitably and inexorably follows that the Legislature has no power to extend the operation of the Supreme Court order in the Thatcher case beyond the jurisdiction of the disbarring court. Can it be said that an act of the Legislature which enlarges the operation of a decree and which ordains that such a judgment shall be conclusive upon the courts in the conduct of their judicial functions and which deprives them of the right to hear and determine upon that subject-matter, is not an exercise of judicial power? If the judicial power extend—as is contended here that it does—to exclude the Legislature from admission and disbarment, then most logically does the conclusion follow that the Legislature can not by enacting that an order of disbarment in one court shall be

a disbarment of an attorney in all courts, thereby decree disbarment. The court must perform that duty. *This court of common pleas has not disbarred Thatcher.* How, consistently with the theory of judicial power, is he now disbarred in this court?

But it is said that this results as a proper police regulation. The answer to this is plain. If the police power of the state is competent and requisite to regulate the subject, and the Legislature is a constitutional agency for that purpose, then the police power is competent as related to the whole subject-matter. If police power (which is legislative) is appropriate, the matter is not exclusively within judicial power. The invalidity of the Thatcher relief act must then be predicated upon some other constitutional ground than the exercise of judicial power; if at the same time the right to exercise police power with regard to the subject-matter be conceded. And if this act be invalid as an exercise of the judicial power, then the act of Legislature is incompetent to ordain that "such suspension or removal shall operate as a suspension or removal in all the courts of the state."

Neither is the action of the Legislature legislative cancellation of a judicial decree. The decree of the Supreme Court disbarring Mr. Thatcher still stands as a decree or judgment of the court. The act relieves him from its operation. This class of legislation has been sustained by our Supreme Court. The term of sentence of prisoners has been submitted to control of administrative prison boards. The conviction is not set aside; the convict is not pardoned but he is thus relieved of the consequences of the judgment against him. Of like character is the act in relation to Thatcher. The decree remains but its operation is suspended by legislative act. Especially must this be recognized in view of the fact that he has not been heard in this court nor disbarment ordered here; whatever may be the case in the Supreme Court, the act is effective here.

The matter of Mr. Thatcher's right to the privilege of an attorney now stands before the court as a separate and distinct matter of which his right is the sole subject. Having originated as a separate matter, upon the voluntary action of the court, evoked by no complaint and standing upon its docket without

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reference to any cause or proceeding, the occasion is different than might have existed had the question arisen to be tried as an issue in a case. Here, the court has assumed the office of inquisitor. This being the posture of the affair, the act of the Legislature authorizing Mr. Thatcher to appear as an attorney in this court is a sufficient showing upon his part and warrants the demand that the proceeding instituted by the court as a separate case be forthwith dismissed. Whether constitutional or unconstitutional, the act of the General Assembly confers upon Thatcher a color of the right he claims. Voiced in the language of our Supreme Court:

“The direct question in this case is: Whether the reputed or colorable authority required to constitute an officer *de facto* can be derived from an unconstitutional statute? The true doctrine seems to be, that it is sufficient, if the officer holds the office, under some power having the color of authority to appoint; and that a statute though it should be found repugnant to the Constitution will give such color.” (*Ex parte Strang*, 21 O. S., 610, 618.)

The duty of judges and courts is to decide cases as the necessity arises. As said by the Supreme Court of the United States last year of its relation to Congress under the Constitution:

“This court has no veto power on legislation and its right to declare an act unconstitutional can only be exercised when a proper case between opposing parties is submitted for determination.” (219 U. S., 347.)

If they know of violation of law, it is not their duty to become prosecutors. Moreover, nothing has more seriously impaired the respect for the observance of law than the constant and continued attack upon the validity of statutes. Citizens consider themselves authorized to ignore laws as unconstitutional until, forsooth, they are advised by the courts to obey. Justices of the peace, police officers, every petty functionary in the state assume to declare acts of the Legislature unconstitutional. This attitude towards statute law is subversive of both public and private rights and security. A kindred doctrine of nullity led to the Civil War.

In this proceeding there is no proof of offense, or violation of propriety or immoral conduct on the part of Thatcher before the court. His right is now challenged upon evidence that he has been disbarred by the Supreme Court. An act of the Legislature has been passed for his relief. These are the only facts in evidence before the court. The court, therefore, on its own motion, as it seems to me, should not maintain, but should forthwith dismiss this proceeding, the sole purpose of which is to question the operation of a statute and to nullify the action of the Legislature by declaring its act as unconstitutional. On this occasion neither the dignity, power nor orderly procedure of the court have been affected in any pending case. The public order and respect for law require that this court shall be first to submit to ostensible authority until its own right and privileges have been imperiled. That occasion does not now present itself.

APPLICATION OF THE DOCTRINE OF ACCELERATION OF REMAINDERS.

Common Pleas Court of Hamilton County.

ELIZABETH GLENN DYMOND AND THE CENTRAL TRUST & SAFE
DEPOSIT COMPANY, EXECUTORS AND TRUSTEES UNDER THE
WILL OF RICHARD DYMOND, DECEASED, V. ELIZA-
BETH GLENN DYMOND ET AL.

Decided, January 27, 1912.

*Wills—Life Estate Bequeathed to Widow—Terminated by Her Election to Take Under the Law—Immediate Distribution of the Estate Ordered.**

The election by a widow to take under the law, rather than under the will of her late husband which bequeathed to her for life the entire income of his estate from every source derived, accelerates the remainder and causes it to vest at once in accordance with the terms of the will.

*Lewis N. Gatch, Frank O. Suire and Roy M. McLaughlin, for
plaintiffs.*

Frank F. Dinsmore, contra.

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Dymond et al v. Dymond et al.

CUSHING, J.

This action is prosecuted by the plaintiffs to obtain a construction of the will of Richard Dymond, deceased. The admitted facts are that all the property of which the deceased died seized came to him by purchase; that the will in question is the valid last will and testament of Richard Dymond, deceased; that the will gave to Elizabeth Glenn Dymond a life estate in all the property of the deceased, that is, she was to have the income of the entire estate during her life; but that the widow, Elizabeth Glenn Dymond, elected to take under the law and she is entitled to have her share of the estate (one-third of the personal property and her dower interest in the real estate) distributed to her at this time.

The clauses of the will, the language of which it is claimed is uncertain are items six and seven of the will, but as these clauses can not be properly construed without reference to items two, three and four, they are here set out:

"Item 2. I hereby will and devise to my beloved wife Elizabeth Glenn Dymond, of the city of Cincinnati and state of Ohio, during her natural life the entire income of my estate, to include the income from every part of my estate from whatever source derived. The said income to be paid to her quarterly, at the end of each quarter after my decease.

"Item 3. I also will devise to my beloved wife, Elizabeth Glenn Dymond, during her natural life, our *family residence No. 742 West Sixth street, Cincinnati Ohio*. I also will and devise to her all our household goods of every kind to dispose of or distribute in any manner or way she may think best, including furniture, piano, paintings and statuary, jewelry, mirrors, bric-a-brac, etc., these household goods shall not be regarded or accounted for as part of my estate for appraisement.

"Item 4. I will and devise to my brother, John Dymond of New Orleans, my undivided interest in their family home property No. 1305 Fourth street corner of Chestnut street, New Orleans, La.

"Item 6. I will and direct that after the death of my said wife, that my executors pay to St. Paul Methodist Episcopal Church, S. W. Corner Seventh and Smith streets, Cincinnati, Ohio, the sum of five thousand dollars (\$5,000) the same to be invested by the trustees of said church as an endowment fund and the income to be applied towards the support of the said

church. This amount to be paid as soon as convenient after the death of my wife, at the discretion of my executors within three years.

"Item 7. After the death of my wife Elizabeth Glenn Dymond, and after providing for all the payments hereinbefore named, I will and devise one-half of my aforesaid estate then remaining to my brother John Dymond of New Orleans, and Belair, state of Louisiana, and the other or remaining half to his children then living and to the issue of any that may have died, the issue of such deceased child to take the share that such deceased child would have taken if then living. The proportionate division to each of the aforesaid children shall be as follows, to Helen Dymond Benedict two-sevenths (2-7) to Florence Dymond two-sevenths (2-7) to John Dymond, Jr., one-seventh (1-7) to William Dymond one-seventh (1-7) to Richard Dymond, Jr., one-seventh (1-7). If there be no issue to a deceased child then the share of the deceased child shall be distributed to the brothers and sisters of the deceased child, divided in the proportion as named above."

The contention of the plaintiffs is largely based on the language of *Items 6 and 7*, or rather upon the following words of the same, * * * "That after the death of my said wife * * * and the other or remaining half to his children then living, and to the issue of any that may have died."

The bequest to the St. Paul Methodist Episcopal Church designated in the will is, "to be paid as soon as convenient after the death of my wife," etc.

The contention of plaintiffs is that this language means that the estate should be held by the executors until the death of his wife, and that thereafter the Central Trust & Safe Deposit Company, one of the plaintiffs herein, should distribute the estate as provided in the will. If this language stood alone plaintiff's contention no doubt would be the true construction of the will. The language above quoted must be read and construed with reference to other parts of the will. The rule of construction of wills is that it is the duty of the court to ascertain and determine the testator's intention as expressed in his will, and its application to existing facts and circumstances with which such intention deals. The presumption of law is that when Mr. Dymond executed this will, he knew the law, viz., that his wife had

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the right to elect either to take under the law or under the will. Also that he had in mind who were his relatives by blood and marriage, and his duty to both. Reading the will as a whole it seems that the intention of the testator is clear, that he intended to provide for his wife for her life, and that all of his property, except a very small part, both real and personal, at her decease should go to his blood relatives, that is to his brother, and his brother's children. The clear intention of the testator was to create only a life estate in the property prior to its vesting in his blood relatives. It probably never occurred to him that his wife would elect to take under the law and thus terminate such an estate. It is equally clear that he intended upon the termination of the estate thus created that all his property should be distributed at once to his legatees. There is no interest or right, present or future, in any one else. The entire beneficial interest of his property is the property itself, and when it is given, possession only is postponed. A court of equity will look to the purpose of the postponement. The testator's purpose is apparent. It was to preserve the property together to secure the income of the same to his widow. No one else is benefitted in any way present or future by this provision and there is no other purpose for it discernible in the will or suggested by the testator's circumstances.

The law is that where a testator creates a life estate in his property, and the property is held for the purpose of securing to the life tenant the benefit devised to that tenant, and no other intention appears from the will of the testator, and in case the life tenant declines or is unable by reason of any legal incapacity to accept under the terms of the will, the life estate will be said to terminate and the period of payment will be accelerated. In other words, the termination of the life estate will determine the time of distribution of the remainder.

The doctrine of acceleration of remainders has been universally applied by the courts and upheld by the Supreme Courts of many states.

In the case of *Holdren, Admr., et al v. Holdren et al*, 78 O. S. 276. the court say:

“Under the doctrine of acceleration of remainders a devise to A for life, and at his death to B, is to be read as a limitation of a remainder, to take effect in every event which removes the prior estate out of the way; but this doctrine rests on the presumed intention of the testator and will be applied only when promotive of his intention.”

The case of *Lainson v. Lainson*, 18 Beav., 1, decided by Sir John Romilly, announces the same doctrine. The court say:

“The question is whether this creates an intestacy or an acceleration of the estate to the son of John Lainson; and I am of opinion that it is an acceleration of the estate to the son and not an intestacy. I have looked carefully at the authorities, and I am unable to distinguish the case where a person gives an estate to another and that fails, from the case where the testator himself directs that it shall fail; and although the expression used is that the estate to the son of John Lainson is only to take effect ‘from and after John Lainson’s decease,’ I am of opinion that the meaning is ‘from and after the determination of his estate by death or otherwise.’ In deciding thus, I fulfill the intention of the testator. It is expressly stated in the will that the testator did not intend the son to take the estate in addition to the annuity (which he would do if I were to hold there was an intestacy), but in lieu of it, the result is that I must make a declaration that there is an acceleration of the estate to the eldest son of John Lainson.”

The doctrine of acceleration of remainders has been pronounced by many courts, and uniformly when the intention can be ascertained from the will and that intention was that the possession of the estate was postponed only for the purpose of the life estate, the doctrine of acceleration applies.

In the case of *Shulz’s Estate*, 113 Mich., 592, the court say at 593:

“The life estate in the widow was as effectually terminated by her election as it could be by her death. The will makes no provision for the care and control of the estate in the event that the life estate should be terminated by the election of the widow.”

In the case at bar no provision is made in the will for the care and control of the estate between the termination of the life

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estate and the death of the widow. In the absence of such a provision, I must apply the doctrine of acceleration.

The only other question contended for by plaintiffs is that part of the will which provides, "the remaining half to his children then living, and to the issue of any that may have died."

Counsel for plaintiffs argues that this means that the estate shall be held by the executors until the death of the widow. His reason is that it is not clear from the will whether the testator intended that his property should go to his nephews and nieces, or whether it should go to the children of such nephews and nieces. It would be hard to reach such a conclusion from the terms of the will. It has been determined that language similar to that used in this will does not create any contingency whatever.

In the case of *Small v. Marburg*, 77 Md., 11, the language of the will was, in case of the death of either of his said brothers the share of said residue bequeathed to him was to go to his children. The court in construing that will uses the following language:

"That the words 'in case of death of either of my said brothers' imported no contingency whatever, and the title to the proceeds of the sale of the testator's house vested in the residuary legatees at the time of the renunciation of the widow, and the title to the other property embraced in the residuum vested in them at the death of the testator."

The evident intention of the testator was that the title and beneficial interest in the property should immediately vest in his brother and his brother's children, but in case the wife elected to take under the will and in case of the death of any of the testator's nephews and nieces, he directed how the estate should go in that event. The will does not mean that the property was to be held and given to the issue of such nephews and nieces.

In the case of *Yeaton v. Roberts*, 8 Foster (N. H.), 459, it is held:

"Where there is a devise or a legacy to several in succession, it does not lapse by the incapacity or refusal of the first devisee or legatee to take, but passes to him next in succession."

Also in the case of *Holderby v. Walker*, 56 N. C., 48, the court held:

“Where a husband willed his whole estate to his widow for life, with remainders over, upon the expiration of such life estate, and the widow dissenting from the will took a third of the estate, it was held that the remainders limited of the other two-thirds vested in possession immediately.”

I am of the opinion that the election of the widow, Elizabeth Glenn Dymond, to take under the law, terminated the life estate, and on said termination of the life estate \$5,000 vested immediately in the St. Paul Methodist Episcopal Church, southwest corner of Seventh and Smith streets, Cincinnati, Ohio; and one-half of the remainder vested immediately in John Dymond, and the remaining one-half in the children of John Dymond named in the will and made parties hereto.

A decree ordering distribution according to this finding will be entered.

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Postna v. Lakewood.

APPLICATION OF THE REFERENDUM ACT.

Common Pleas Court of Cuyahoga County.

GEORGE POSTNA V. CITY OF LAKEWOOD ET AL.

Decided, March 2, 1912.

Municipal Initiative and Referendum—Application of, to Ordinances Passed by a Village upon Becoming a City—Uncertainty as to Certain Features of the Act—Evidently Made a Law Without Intent to Make it Effective—Sections 4227-1-2-3, P. & A. Anno. General Code.

Ordinances creating police and fire departments for a village which has been advanced to the grade of a city are ordinances providing for the expenditure of money, and are therefore subject to the referendum provided by the Crosser act, and do not become effective for sixty days after passage.

BABCOCK, J.

The plaintiff seeks a temporary injunction restraining the city of Lakewood, John D. Coffinberry, its mayor, Byron M. Cook, auditor, and Louis R. Smith, treasurer, from paying Robert Bowie and four other persons recently appointed to positions in the police and fire departments of the city of Lakewood, in the place of B. F. Woods and others who have been attempted to be displaced by the director of public safety of said city from the positions in said departments theretofore held by them.

Lakewood was a village until February, 1911, since which time it has been a city, having been advanced to that position by reason of population as determined by the last federal census.

On January 15th, two ordinances were passed, one with reference to the creation of a police department, wherein a chief of police and patrolmen were provided for, and the other having reference to the creation of positions in the fire department of the city. Plaintiff denies the regularity of the appointments under these ordinances of January 15th, and prays for an injunction restraining the officers of the city from issuing any orders or

warrants, or in any manner making payment to said appointees under the ordinances, of any funds of the city.

Section 3497 of the General Code provides for the classification of municipal corporations, and says that municipal corporations which at the last federal census had a population of five thousand or more shall be cities.

Section 3499 of the General Code provides that officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election; and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed.

It is not controverted, I believe, that the word "officers" in this section refers to elective officers.

Section 4488 of the General Code is as follows.

"To prevent the stoppage of public business, or to meet extraordinary exigencies, as provided in this title, the mayor may make temporary appointments."

Section 4227-1, 2 and 3, known as the Crosser act, provides for municipal initiative and referendum. It is contended by the plaintiff that per force of this section the ordinances of January 15th are not yet operative, and that the appointments thereunder are therefore irregular and illegal; consequently that no public money can be appropriated to the payment of salaries to such irregular appointees at the present time.

It will be observed that the ordinance as regards the police involves the creation of offices which did not theretofore exist, since the village only had a marshal, whereas the city of Lakewood, which has succeeded the village, is to be furnished with a police system having a chief of police and other officers.

It becomes necessary, then, to examine and determine the meaning of the initiative and referendum statute, in so far as it is involved in the question at bar.

The first sub-section provides for the initiative, and includes within its provision "ordinances providing for and declaratory of any and all powers of government which the General Assembly has delegated or may hereafter delegate to any municipal cor-

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poration, in accordance with the provisions of the Constitution and all repealing ordinances."

This language would seem to be the most comprehensive possible to be used.

Sub-section 2 is divided into two paragraphs, the first one providing for a referendum within thirty days, but without any provision that the ordinance or other measure shall be in abeyance and not become effective at once. The second paragraph of that section provides for ordinances and other measures which may be referended at any time within sixty days; and that, during the interim, the ordinance or measure shall not become effective in less than sixty days after its passage. Sub-section 3 provides for all other acts of the council not included among those specified in Section 2. These are to remain inoperative for sixty days after passage, and are subject to the referendum, with this exception, that as to such, if declared emergency measures and they receive a three-fourths majority in council, they may go into effect immediately, and remain in effect until repealed by the council or by direct vote of the people.

If we were permitted to go outside of the record and consider the political maneuvers which attend law-making, we would know that there is no legislative intent, held either by the General Assembly or any member of it, expressed in this law, the fact being that it was put into the shape it is for the same reason that cannon are spiked so as to render them useless. But we are not permitted to indulge in these sources of information, but are compelled to take the law as it reads and give meaning to it where possible.

The two paragraphs of sub-section 2 give a list of the things which may be referended under certain forms and procedure. In so many respects do they resemble each other in phraseology but not in operation, that with both in mind it is easy to see that the first paragraph provides for ordinances (1) granting a franchise, (2) creating a right, (3) involving the expenditure of money, and (4) exercising any other power delegated to such municipal corporation.

Leaving out the general clause just quoted, all the others are in the second paragraph of the section, with the following added:

"conferring, extending or renewing a right to a use of streets, or requiring the use of the streets for water, gas, electricity, telephone, telegraph, power of street railway, or other public or quasi-public utility."

To the extent anything is enumerated in the second paragraph that is not in the first, to that extent the time is extended to sixty days; and as to such, the ordinance does not become effective within sixty days. As to such as are in the first paragraph and not in the second, there is no provision extending their going into effect, nor can the referendum or the right of referendum extend beyond thirty days before the filing of the petition. The expression "or exercising any other power delegated to such municipal corporation" I think should be read and construed under the rule *ejusdem generis*, which is defined as follows:

"It is a rule of interpretation sometimes called Lord Tenterden's Rule, that where a statute or other document enumerates several classes of persons or things, and immediately following a class with such enumeration the clause embraces 'other,' will generally be read as 'other such like,' so that persons or things therein comprised may be read as *ejusdem generis* with and not of a quality different from those specifically enumerated. * * * And general words following particular and specific words must ordinarily be confined to things of the same kind as those specified." *Bishop's Written Laws*, Section 245.

It is true that this rule is not to be employed in any case to defeat the plain intent of the General Assembly, but I think it applicable here.

There are some things in the second paragraph that are not included in the first. What is left for sub-section 3 under the phrase "all other acts of city council not included among those specified in Section 2 of this act," it is difficult if not impossible to say. If I were compelled to give meaning to all of these provisions, I should give up the task in hopeless despair, but I have only to apply this statute to the particular case at bar; and it seems sufficient for me to say that when Lakewood became a city and it had to create a police department, and to that end passed an ordinance on the 15th of January creating the office of chief of police and the offices of subordinate policemen, giv-

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ing to them a salary, that such ordinance "involved the expenditure of money." Surely the creation of an office with a salary involves an expenditure of money to pay the salary; and language can not be plainer than that for sixty days such ordinance does not go into effect. With the consequences of this delay, the court has no concern.

Section 4488 provides for temporary appointments to prevent the stoppage of public business, but it is not claimed that these appointments were made under that section. Until the language of this statute is changed, there will be no way, I think, to interpret or construe it except to apply the cases to it as they come up, and leave the rule of interpretation to be gathered from the line which the interpretation makes as the cases array themselves in the adjudications which result.

I only decide in this matter that these ordinances involve the expenditure of money, and they are not in force for sixty days from January 15th. In the meantime I think there is no authority to apply public moneys to the salaries which are provided for the offices which these ordinances seek to establish.

The suggestion is made that the interpretation which seems to be involved in this decision would so tie up the hands of city government as that the regular department officials can not be paid under the appropriation ordinances which are monthly passed. I do not think these involve the expenditure of money. They simply appropriate that which is already set apart to the purpose, and are the only means of making payment of obligations already existing; and instead of involving the expenditure of money, they simply involve a process of appropriating it to the purposes to which it is already set apart and bound in law to be devoted.

That there are many inconveniences attendant upon this statute, no matter how interpreted, can not be denied; but the relief seems to be with the Legislature, and not with the courts. There is only one other way in which I can find a means of escape from the embarrassment entailed by this statute, and that would be by declaring it void for uncertainty. I do not find in works on interpretation any rule of that kind. The General Assembly must have meant something by this statute, and it is for the

court to determine and declare what it was. I have done so in part, and in part only, throwing in some suggestions for whatever they may be worth.

Temporary injunction is granted.

LEVY ON PERSONAL EARNINGS.

Common Pleas Court of Franklin County.

BARROW V. WILLIAMS.

Decided, March, 1912.

Attachment—Sufficiency of Affidavit in Support of—Where the Proceeding is Directed Against Personal Earnings—Necessary Allegations to Exempt Ninety Per Cent. of Earnings for Services Rendered within Three Months.

1. An affidavit in support of a proceeding in attachment on a claim for necessities, where directed against more than ten per cent. of personal earnings of the defendant for services rendered within three months, is insufficient when it is not alleged that the defendant is not the head or support of a family or in good faith the support of a widowed mother.
2. A married man who is living apart from his family and not supporting them, is not entitled to the benefit of the statute exempting ninety per cent. of his earnings from attachment.

R. B. Barcus, for plaintiff.

Chas. R. Doll, contra.

BIGGER, J.

Motion to dissolve attachment on appeal from the decision of a justice of the peace, refusing to sustain such motion.

It is claimed that the affidavit for attachment is insufficient and that the facts stated therein are untrue. In my opinion this affidavit is insufficient under the statute. The affidavit reads as follows, omitting the caption:

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"The said plaintiff, Lillian Barrow, being duly sworn, says that she is the said plaintiff, and that said defendant is justly indebted to said plaintiff for necessities, to-wit: board and lodging and provisions; that the said claim is just; that she believes that plaintiff ought to recover thereon the amount of \$50; that the property sought to be attached is not exempt from execution, and it is the personal earnings of said defendant for services rendered within three months prior to the commencement of this action, and is sought to be attached."

This is followed by averments concerning the indebtedness of the garnishee to the defendant which are not material to the question here involved.

The affidavit discloses that the money sought to be attached is the personal earnings of the defendant for services rendered within three months prior to the commencement of the action before the justice of the peace. It is not stated that the defendant is not the head or support of a family, nor in good faith the support of a widowed mother, but it is stated that the claim is for necessities, and it is the contention of plaintiff's counsel that this is the only averment necessary. In this view I can not concur. The statute, Section 10253, P. & A. Anno. General Code, provides that:

"Except as hereinafter provided, the plaintiff shall have an order of attachment against property of the defendant in a civil action before a justice of the peace for the recovery of money before or after its commencement, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing the nature of the claim, that it is just, the amount the affiant believes the plaintiff ought to recover, and that the property sought to be attached is not exempt from execution. If attachment of the personal earnings of the defendant be sought, the affidavit must also state that he is not the head or support of a family, nor in good faith the support of a widowed mother wholly dependent upon him for support, or that such earnings are not for services rendered within three months before the action was begun, or that, if earned within that time, they amount to more than \$150, and only the excess over that amount is sought to be attached, or that the claim sued on is for work, labor or necessities, and except in cases for such claims, the existence of one or more of the following particulars:"

These particulars are nine in number. Following the enumeration of these particulars the statute further provides:

"No attachment shall issue by virtue of this chapter against the personal earnings of any defendant for services rendered by such defendant within three months before the commencement of the action, or the issuing of the attachment, unless the defendant is not the head or support of a family, or unless the amount of such earnings exceeds \$150, and then only as to the excess over that amount, or unless the claim is one for necessities, and then for only ten per cent. of such personal earnings."

Considering these provisions together, it is plain that in case the defendant is the head or support of a family, or in good faith the support of a widowed mother wholly dependent upon him for support, no attachment can lawfully be issued against his earnings for the period of three months prior to the commencement of the action, except to the extent of ten per cent. thereof. It is not stated in the affidavit that it is sought to attach only ten per cent. of his earnings, and it must, therefore, be presumed, and it is admitted in argument, that they are seeking to attach more than ten per cent. of his wages. There being no statement to the contrary, it must be assumed that he is or may be the head or support of a family or in good faith the support of a widowed mother wholly dependent upon him for support. When the affidavit states that the defendant is not the head or support of a family, etc., then all of his wages may be attached, but if that statement be not contained in the affidavit, then it will be presumed that he is the head and support of a family, and in such case it must be stated that only the excess over \$150, earned within the three months prior to the commencement of the suit, is sought to be attached, or that the claim is one for work, labor or necessities, and that only ten per cent. of his wages is sought to be attached.

The statute provides that when it is sought to attach the personal earnings of the defendant, that in addition to the statements necessary in the case of attachment of other property, either one of three additional statements is necessary, and the last is that the claim is for work, labor or necessities. But this

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provision of the statute must be read in connection with the further provision at the end of the section that no attachment shall be issued upon this ground against the personal earnings of any defendant for services rendered within three months before the commencement of the action or the issuing of an attachment except to the extent of ten per cent. of his earnings.

It is to be observed that the statute does not provide that it shall be sufficient, in case personal earnings are sought to be attached, to state that the claim is for work, labor or necessaries. It simply provides that in addition to the statements therein made necessary, it shall also be stated as follows, and the mere statement that the claim is for necessaries is not sufficient when taken in connection with the further statement that no attachment shall issue upon such ground except for ten per cent. of his earnings. The affidavit must show the right to an attachment, and if this affidavit is to be considered sufficient, then the entire earnings of a defendant who is the head and support of a family down to the commencement of the action may be attached.

Nor is the statement that the earnings are not exempt from execution sufficient to cure the defect. The personal earnings of a defendant who is the head and support of a family for the three months prior to the commencement of the action are only exempt from execution conditionally by Section 11725. They are only exempt from execution when it is made to appear by affidavit of the debtor or otherwise that they are necessary for the support of his family. If the claim is for necessaries, then ninety per cent. of his earnings only shall be exempt upon his making such a showing; if he can not make such a showing, then it would appear from the provisions of that section that they are not exempt from execution. By the provisions of Section 10253, however, no attachment can issue against the personal earnings, for three months prior to the commencement of the suit, of one who is the head and support of a family on a claim for necessaries except to the extent of ten per cent. thereof, whether they are or they are not necessary to the support of the debtor and his family. For the reasons stated, I conclude that

the affidavit is insufficient, and for that reason the attachment must be discharged.

As to the question whether a married man who is living apart from his family and not supporting them is entitled to the benefit of the statute, I am of opinion the decision of the justice of the peace that he was not entitled to the benefit of the statute is correct. This exemption from attachment of the wages of one who is the head and support of a family is only intended for the benefit of his family, and if he is not supporting his family I see no reason for extending to him the protection of the statute. This section of the statute is found within Part 3 of the General Code, and the provisions of all sections contained therein are, by virtue of Section 10214, General Code, "To be liberally construed in order to promote its object and assist the parties in obtaining justice."

It can hardly be said that it would be promotive of the object of this provision of the statute, which, as I have said, is intended to protect the members of the family of one who is supporting his family to extend its provisions to one who is not supporting his family. It is true the statute reads, "one who is the head or support of a family," but in this part of the General Code "or" may be read "and" by virtue of the provisions of Section 10213 when the sense requires it, and I am satisfied that "or" should here be read "and," for its object and purpose is to exempt from attachment the earnings for the benefit of the family, and as I have said, I can see no reason for extending its provisions to one who is only nominally, but not really, the head of a family. Of course I have no doubt that if a man is supporting his family, that the fact that he may be living apart from them would not deprive them of the right to the exemption. But if he is living apart from his family and furnishing no support to the family, then, in my opinion, he is not within the meaning of the statute the head and support of the family, and should be treated as a single man in so far as his right to exemption of his wages from attachment is concerned.

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**CONSTRUCTION OF ORDINANCE PROHIBITING ERECTION OF A
BLACKSMITH SHOP IN A RESIDENCE DISTRICT.**

Common Pleas Court of Hamilton County.

**HOWARD M. LEY ET AL V. DENIS F. CASH, DIRECTOR OF PUBLIC
SAFETY, ET AL.**

Decided, April 25, 1912.

Municipal Corporations—Control of Council over Erection of Buildings—Limited to Plan and Material—Intended Use Not Ground for Refusing a Permit—Blacksmith Shops in Residence Districts—Elimination of Objectionable Features by Modern Methods—Ordinance Presumed to Embody a Valid Legislative Intent—Injunction.

1. It is not within the powers of a municipal council, under Section 3636, P. & A. Anno. General Code, to authorize the building commissioner to refuse a permit to erect a building, lawful in material to be used and in plans and method of construction, and not in itself a nuisance, on the ground of its contemplated use; and where application is made for a permit to erect a building of a lawful character, the duty of the building commissioner is purely ministerial and mandatory.
2. The presumption of a valid legislative intent requires that Section 452 of the codified ordinances of Cincinnati, prohibiting the erection of a blacksmith shop within a square in which two-thirds of the buildings are used as residences, unless consent is given in writing by two-thirds of all the property owners within the square, be construed as applying to the use to which the building is to be devoted, and the word "erected" will be understood to apply to the putting in place of the appliance necessary for carrying on the work of blacksmithing.

David Davis and Frank E. Wood, for plaintiffs.

Alfred Bettman and J. W. Weinig, City Solicitors, contra.

HUNT, J.

Plaintiffs allege that they are the owners of a leasehold with privilege of purchase in certain lots in the city of Cincinnati; that in December, 1911, they applied for and obtained a permit from the commissioner of buildings of said city to erect a "one-story factory building" upon said lots, were proceeding to erect

said building, and have incurred expenses for labor and material therefor; that said commissioner and the director of public service threaten and are about to revoke said permit, to the irreparable loss of plaintiffs; wherefore they ask that defendants be restrained from revoking said permit. A temporary injunction was granted, and defendants now move for the dissolution of such injunction.

The evidence heard thereon discloses that the building commissioner is about to revoke said permit under Section 347 of the codified ordinances of Cincinnati, claiming that the building which plaintiffs are about to construct is to be used as a blacksmith shop, in violation of Section 452 of such codified ordinances, which provide that:

“No * * * blacksmith shop * * * shall be erected in any block or residence square, in which said block or residence square two-thirds (2-3) of the buildings thereon are used for residence purposes, without the written consent of the owners of two-thirds (2-3) of all the property in such block or square improved or used for residence purposes, that the property of such person, company or corporation may be used for any of the purposes above mentioned; said consent shall be filed with the commissioner of buildings.”

Section 576 makes a violation of any of the provisions of the title of which Section 452 is a part, a misdemeanor punishable by fine.

The evidence shows that plaintiffs intend to use the building under construction for the purpose, not of casting or forging structural iron, but for the purpose of handling such iron, by preparing it for use, boring it for riveting and riveting it, and for the purpose of shaping and putting together architectural iron work. Riveting, boring, cutting and shaping machines operated by compressed air are expected to be used; also a gas furnace for the purpose of heating rivets which are expected to be headed by pressure and not by concussion. Only one forge is expected to be used, and that only for repairing and sharpening tools. Plaintiffs' evidence is that the work to be done in the establishment is not such as can be called “blacksmith work,” either in the method of work or in the incidents thereto; such as noise, smoke and dirt,

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all of which under modern methods are claimed to be practically eliminated.

Defendants' evidence is to some extent to the contrary, and that although the modern methods used will to a large extent eliminate smoke, noise and dirt, yet such work is such as is done to a less extent in a blacksmith shop.

Section 452 of the building code was passed by the council of the city of Cincinnati and not by a village council, and not so many years ago that it should be considered as applicable only to such a blacksmith shop as is and can be found in almost every country village. In the interpretation of such ordinance the evils intended to be cured must be considered. Can the court reasonably assume the realization of plaintiffs' expectation that the result of their intended use of modern methods will eliminate all the objectionable features of a blacksmith shop in a residence district, which features must be assumed to have been found by council to be detrimental to such residence neighborhood. If the interpretation of the ordinance in that respect was the only question in this case, the injunction asked for by the plaintiffs should be refused.

The prohibition as to the erection of a blacksmith shop under the conditions as to consent of a certain percentage of the owners of certain property, is a provision of an ordinance of a city and not of the statutes of the state. The power of the city to pass such ordinance must be found in the statutes, and the exercise of such power must not be unreasonable under existing and probable conditions.

The power of council to adopt the ordinance of which Section 452 is a part, is claimed under Sections 3636 and 3650 of the General Code.

Under Section 3636, council has power "to regulate the erection of buildings and the sanitary conditions thereof, the repair of, alteration in, and addition to, buildings and to provide for the erection of buildings and other structures, for the removal and repair of insecure buildings." * * *

For the purposes of this case it may be conceded that Section 3636, General Code, confers upon council the power to adopt the elaborate provisions of the building code, of which Section 452 is

a part, except that Section 452 prohibits the erection, not by reason of the material used or methods of construction, but by reason of the intended use of the structure. Manifestly, the use is not within the scope of Section 3636, except as such use would determine the character of material and methods of construction.

Section 3639 confers power upon council, "to regulate by ordinance the use, control, repair and maintenance of buildings used for human occupancy, or habitation, the number of occupants, and the mode and manner of occupancy, for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof, to compel the owners of such buildings to alter, reconstruct or modify them, or any room, store, compartment or part thereof, for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof, and to prohibit the use and occupancy of such buildings until such rules and regulations have been complied with."

Such regulation as to "use" is by the terms of the section confined to "insuring the healthful, safe and sanitary environment of the occupants of the building."

Council under Section 3646, and the board of health under Section 4413, have power sufficiently large to regulate use for the public health, but such powers are not now under consideration.

Section 3650, prior to the amendment of March 28, 1911, 102 B., 62, conferred upon council power "to prevent injury and annoyance from anything dangerous, offensive or unwholesome." By the amendment it has power to "cause any nuisance to be abated, * * * to prevent injury and annoyance from the same." * * * Manifestly, the power of council to pass the prohibitory ordinance under consideration can be ascribed only to Section 3650, and then only if a blacksmith shop is a nuisance, and for the purpose of preventing injury and annoyance therefrom.

Assuming that council has so found, and assuming that such finding is a reasonable finding, it might be noted that a blacksmith shop would be as much of a nuisance and annoyance for residents immediately adjoining it as to others more distant. Council has seen fit to prohibit the erection of such blacksmith shop, not where the owners of adjoining residences or all the

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owners in the block fail to consent, but only where two-thirds of the owners fail to consent. The one-third not so consenting may be the owners of residence property immediately adjoining the proposed shop. It might be further noted that a blacksmith shop established in a building already constructed, would be as much of a nuisance as a blacksmith shop established in a building constructed for that purpose.

Council, however, for the purpose of abating any nuisance and preventing injury and annoyance therefrom, has power to regulate the use of buildings or structures, but such power does not include any power to prohibit the erection of a structure lawful in construction and not in itself a nuisance.

The term to "erect a blacksmith shop" in view of such power and its limitation might be applicable to the putting in place, and erection of the appliances used in blacksmith work; i. e., the use of the building rather than the erection of the building in which such work is done.

An ordinance, if possible, is to be given a valid construction. Imperfection in legislation is to be expected. An ordinance which only partially accomplishes a lawful purpose is not invalid, if what is accomplished is within a lawful power. The presumption of a valid legislative intent sometimes necessitates the disregard of the ordinary and technical significance of words.

Assuming that the section can be given a valid construction, the enforcement of the penal conditions of Section 576 would, to some extent at least, protect a residence block from the establishment and operation of any blacksmith shop not already established and in operation, without either the building commissioner being permitted to exceed his powers, or the court being compelled to speculate as to whether a building about to be constructed in full accordance with the building regulations as to material and method of construction, is to be used in violation of law.

The plaintiff applied for a permit to build a factory—a lawful structure under the ordinance. If the building contemplated is in plan, material and manner of construction, considered in connection with the declared purpose to which it is to be put, in accordance with the law, the duty of the building inspector to issue the

permit is mandatory and ministerial. If in the course of construction, the law is violated, such permit undoubtedly can be revoked, but the building commissioner has no right to assume that the law will be violated in the subsequent use of a lawful structure. A permit to build is in no sense a permit to use. Use is an incident to ownership, subject, however, to lawful regulations.

Courts of equity, when their powers are properly invoked, enjoin contemplated acts, when, after judicial investigation, such contemplated acts are found to be a nuisance, notwithstanding the commission of said acts is made a criminal offense (*State v. Hobart*, 8 N. P., 246); but an executive or administrative officer in the performance of a ministerial act, mandatory under certain structural conditions, has no right to attach other conditions or to assume, or find, that the law is to be thereafter violated in the use to which the structure may be put, and thereby interfere with the enjoyment of substantial property rights. If the required conditions exist, the building commissioner has no discretion in the issue of a permit. If, after the building is constructed, it is used unlawfully, or is about to be used unlawfully, there are adequate remedies for the prevention of such use or continued use.

It is claimed in this case that for the court to enjoin the building commissioner from revoking his permit already issued, would be contrary to the principles laid down in *Predigested Food Co. v. McNeal*, 1 N.P.(N.S.), 105; *Clifton Springs Distilling Co. v. Brown*, 8 N.P.(N.S.), 105, and similar cases.

Such cases are inapplicable to the present case for the reason that to enjoin would not be an interference with any discretionary powers of the building commissioner, nor any direct interference with a criminal prosecution of the plaintiffs for the violation of the ordinance, as a valid ordinance. It is true that if the commissioner is enjoined from revoking the permit, the plaintiffs can not be prosecuted for building without a permit, but such interference is a mere incident, in no way precluding the plaintiffs from being prosecuted for any violation of the ordinance under consideration in the use of the structure if they attempt to so violate it.

To construe the ordinance as prohibiting the erection of a building lawful in structure and material and not in itself a nuisance,

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would be to declare it invalid, but it is not necessary to so construe it. It can be construed as prohibiting a specific use, and therefore for the purposes of this case may be assumed to be valid. So construed, the building commissioner has neither a right to refuse a permit to build such lawful structure, nor a right to revoke a permit to build already given, simply because a prohibited use of such structure is anticipated or contemplated.

The motion to dissolve the injunction is therefore overruled.

**PUBLICATION OF COUNTY COMMISSIONERS' ANNUAL REPORT
IN A GERMAN NEWSPAPER.**

Common Pleas Court of Lorain County.

STATE OF OHIO, EX REL FRANK M. STEVENS, PROSECUTING ATTORNEY, V. THE LORAIN DEMOCRAT CO. ET AL.*

Decided, April 22, 1911.

Publication—Construction of Section 2508, General Code, Providing for the Publication in a German Newspaper of the County Commissioners' Annual Report—Constitutional Law.

1. A newspaper published in the German language is competent to publish the annual report of the county commissioners, as provided in Section 2508, General Code, if it have a *bona fide* circulation within the county of six hundred or more copies, notwithstanding its circulation is not distributed generally over the county, but is limited to a comparatively few townships, and does not include all the townships containing German residents, and but a small proportion of its subscribers speak the German language exclusively.
2. The provision of this statute for publication of the county commissioners' annual report in a newspaper published in the German language, if there be such a paper published within the county of the required circulation, is not violative of the constitutional guarantee that political power shall be exercised for the equal protection and benefit of the people, and that laws of a general nature shall have uniform operation throughout the state.

* Affirmed by the Circuit Court without opinion, September Term, 1911.

Frank M. Stevens, for relator.

G. A. Resek, contra.

DOYLE, J.

The board of commissioners of Lorain county, the co-defendants of the Lorain Democrat Co. herein, pursuant to Section 2508, General Code, gave to the defendant, the Lorain Democrat Company, their last annual report of their financial transactions during the year next preceding the third Monday of September, 1910, for publication in the *Lorain Post*, a newspaper printed by said defendant in Lorain county in the German language.

The plaintiff brings this action to enjoin such publication and to enjoin the commissioners from paying for such publication.

It was contended by the relator that the newspaper in question did not meet the requirements of Section 2508, General Code (R. S., 917).

According to the statute, in order to be qualified to make such publication, it must have had "a *bona fide* general circulation of not less than six hundred among the inhabitants of such county speaking that language."

The evidence shows that the paper has a *bona fide* circulation of over six hundred among subscribers of whom 93 spoke German only, and 594 spoke both German and English. As to the other subscribers there was no evidence as to their ability to speak German. There was some contention made that the subscriptions were not all *bona fide*, but the evidence did not show that they were not *bona fide*, but on the contrary tended to show that more than six hundred of the subscriptions were *bona fide*. This makes its circulation *bona fide*.

It was further contended that the circulation should have been among the inhabitants speaking that language only. The statute does not warrant such a construction. In fact the requirements of the statute would have been met, if every subscriber were able to speak several languages, including German.

The relator claimed with a strong showing in favor of his position that the *Lorain Post* did not have a general circulation

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among the inhabitants of Lorain county speaking the German language.

If the use of the word "general" in this connection means that the *Post* should have a circulation among the various German speaking communities of the county, substantially in proportion to its entire circulation, that the number of German speaking inhabitants of that community bears to the total number of German speaking people of the county, then the plaintiff's position would be correct. Even if it meant that it should only approximate such a proportion the court would feel constrained to sustain his contention.

But, the use of the word "general" in connection with circulation of a newspaper, while it may refer somewhat to the extent of its circulation through a given community, in the main refers to the character of the paper and the purpose of its publication, whether designed to represent some special interest, business, trade, society, religion, organization or whether designed for circulation as the disseminator of intelligence of passing events, local and general news and items of common interest.

A paper of general circulation is one not devoted to any single or particular object, but is devoted to matters pertaining to and of concern to the whole community and of public and common interest. The purposes to which the paper is devoted must be of common interest to many.

There is no evidence in this case to show that the *Lorain Post* was not a paper published for general circulation, to give the news and items of common interest to all persons who might care to take the paper.

The paper being printed in the German language was intended for general circulation among people who could use that language.

The evidence shows that the greatest number by a large majority, of the subscribers had their papers delivered to them in the city of Lorain, or through the post office in Lorain. Some of the subscribers in Brownhelm township as well as Black River township got their mail at Lorain. Some of the Brownhelm people got mail at Vermilion and Amherst, where papers were

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sent to subscribers. The following schedule shows about how the other subscribers were distributed:

Township.	Estimated number of German speaking people.	Subscribers.
North part of Avon	Several hundred	0
South " " "	150	10
Amherst	2000	50 or 60
Brownhelm	200	Few.
Henrietta	200	0
Elyria	1000 to 1100	12
Oberlin	100	4
Russia	75 to 100	0
Eaton including Grafton	200	0
Ridgeville	200	0
Columbia	200	0
Pittsfield	6 or 8	0

The people of Sheffield get mail at Lorain, and it is estimated that there are from 300 to 500 German speaking people in that township.

In La Grange there are about forty families who speak German and the number of persons in these families was estimated at two hundred. No evidence was given as to the number of German speaking people nor number of subscribers in Carlisle, Camden, Brighton, Wellington, Penfield, Rochester and Huntington.

It will thus be observed that the entire circulation is in the north half of the county, and in one-third of the townships of the county, but at the same time the circulation is in that part of the county where the great majority of the population of the county lives. There was no evidence as to the number of German speaking people in some of the southern townships, and from what evidence there is before the court it is apparent that the majority of the German speaking people of the county is in a few of the northern townships.

In a recent case from Wood county in the Supreme Court, the circuit court was affirmed where it had dismissed a petition praying an injunction to restrain the commissioners of that county from publishing the report of the commissioners in a cer-

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tain newspaper of general circulation in the county as required by Section 2508. The Supreme Court however did not pass on the merits of the case because the finding of fact of the circuit court was held conclusive on the Supreme Court and it merely affirmed. *State v. Wood Co.*, 14 C.C.(N.S.), 531; affirmed, no report, 84 O. S., 447.

The common pleas court had granted the injunction but the circuit court found differently and dismissed the petition.

In that case it appeared that in five of the twenty townships of the county the newspaper had no subscribers. In fifteen townships with a population of 35,457 it had a circulation of thirty-six, or about one-tenth of one per cent. The total population of the county was 51,733. Almost the entire circulation was in five townships in the south part of the county, having a total population of 16,276.

It was held by the circuit court that the newspaper was a paper of general circulation in Wood county.

By the census of 1910, Lorain county has a population of 76,037. In six of the townships of the county where there was clearly shown to be a circulation, there is a population, as shown by the same census, of 58,565. These six townships hold 77 per cent. of the entire population of the county. This is a better showing of distribution of circulation than obtained in the Wood county case. If the manner in which the circulation of a newspaper is distributed is to control in determining whether it is general or not, then the *Lorain Post* has made a better showing in that respect than the newspaper in the Wood county case, and if the court follows that case the finding should be for the defendant.

The evidence in the case at hand as to number of German speaking people in the several townships was largely made up of off hand estimates, except as to those in Elyria. The data on which the court is asked to predicate its judgment is to some extent rather indefinite and uncertain, and in view of the meaning which the court believes should be given to the word general in the way it is used in Section 2508, the relator on the evidence is not entitled to the relief prayed for in his petition on the propositions above discussed.

The paper in question has a circulation of not less than six hundred among the inhabitants of Lorain county speaking the German language, and being a newspaper for general circulation and not limited to any special trade, business, society, religion or other purpose, it has a general circulation among those people.

The relator claims that Section 2508 is unconstitutional because, first, it violates Section 2 of the Bill of Rights of the Constitution of Ohio, which declares that "all political power is inherent in the people. Government is instituted for their equal protection and benefit," and second, Section 26, Article II, which provides: "All laws of a general nature shall have uniform operation throughout the state."

Is this law in derogation of the equal protection and benefit of the people for whom government is instituted?

It was not enacted to confer any specific benefits nor make any restrictions upon the people. It is a regulation of the manner in which publicity shall be given of certain acts and transactions of public officials. The entire omission by the legislative branch of the government to provide by statute for the publications in newspapers required by this section would be no violation of Section 2 of the Bill of Rights. The act of April 8, 1876 (73 v. 141), which on authority of *Cincinnati v. Bickett*, 26 O. S., 49, and *Schloenbach v. State*, 53 O. S., 345, required the publications provided for, in none but papers printed in the English language would not be in conflict with said Section 2. Its constitutionality has never been questioned, though publicity under it was not provided for in newspapers of more than two of the several political parties. No more in principle did the act of April 17, 1896 (92 v. 188), deprive the people of their equal protection and benefits, by further extending that publicity to those speaking the German language, if there were a sufficient number of such persons in the county in question who would subscribe for a paper printed in that language to bring it within the statutory requirements as to circulation. The object of the law is to give publicity, not particularly to benefit any newspaper nor any class of persons. To prescribe the manner of giving the acts and transactions of the commissioners pub-

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licity is in the province of the Legislature. If the failure to provide any publication will not deprive the people of the equal protection and benefits of government, then a provision for the publication in the recognized language of the people of this state will not be a deprivation, even to persons speaking a foreign language who have become inhabitants of the state, for they are bound to recognize that the language in which official business is conducted in this state is English. If then, further publicity is provided for, by publication in a newspaper printed in a foreign language spoken by a very large number of our people both native and foreign born, shall it be said that those who understand only this language and do not take the newspaper in question together with people speaking other foreign languages have not the equal benefit and protection of the law? If this be so then the publicity provided for in 73 O. L., 141, is a violation of the Constitution, because the logical requirement of that law was to compel a man to become a subscriber of one or the other of the two favored political papers.

The court does not believe that the section in question of the Bill of Rights was ever intended to so interfere with the *modus operandi* of the Legislature in carrying out the multifarious details of the people's business.

The second objection to the constitutionality of Section 2508 is that it is not of uniform operation throughout the state. The object of the law as already stated is to carry out the policy of the state to give as much publicity as possible within reasonable bounds of the acts and transactions of the officials of the counties. It would be beyond the bounds of reason to attempt to bring home to each inhabitant notice of public matters. To give such matters a fair and reasonable notoriety is all that should be required.

The method and extent of the publication provided in this instance by the Legislature is uniform in that it applies to every county which now has or may hereafter have the prescribed newspapers by which such publication can be made. There is no classification of counties except such as naturally and necessarily follows from an attempt to provide a uniform method of giving publicity upon some proper and reasonable plan that in

the wisdom of the Legislature will approximately attain the required object of its policy with no absurd consequences. A law of a general nature may have universal operation throughout the state, within the meaning of Section 26, Article II of the state Constitution, although it is not universal in its operation, in that the conditions upon which it can operate and become effective do not exist in certain political subdivisions of the state. *Columbus v. Jeffrey*, 2 N.P.(N.S.), 85, affirmed in *Jeffrey v. State*, 4 C.C.(N.S.), 494.

If there is want of uniformity because there are some counties that do not now have or may not at some future time have a newspaper printed in the German language that measures up to the requirements of the statute, then you may find many other cases of want of uniformity in our statutes, and you need look no farther than the portion of this section relating to publications in English papers. In some counties where two papers of different political parties are published there must be publication in two newspapers and where there are not two such papers published, then there shall be a publication in but one paper.

The newspaper case cited by the relator, *State v. Chamberlain* (N. J.), 24 Atl., 478, involved the constitutionality of a law directing that "in all cities in which a newspaper printed in the German language shall have been published at least once a week for a period of not less than three years prior to the passage of this act, such newspaper printed in the German language shall be designated as an official newspaper of the city." It was held that this law was not of uniform operation. By its terms it only applied to cities *which at that time* had newspapers having the designated qualification.

If Section 2508 limited the counties in which publications in German newspapers were to be made to those counties only in which at the time of the passage of the act there were such papers as had the designated qualifications, then it would not have had uniform operation.

This was the infirmity of the Summit county depository law (86 v. 70) passed on in *State v. Ellet*, 47 O. S., 90.

Section 2508 was not designed to characterize nor define the county in which publications were to be made in the several

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ways prescribed, but to designate the manner in which publications were to be made according to the means existing in the counties of the state for giving publicity to the transactions of the commissioners of such counties. The number and kind of newspapers published in the several counties also indicate somewhat the necessity of much or little publication to give the publicity required; it furnished a scheme of publicity regulated by the local conditions in the counties of the state in such a way that the means of publicity were, as near as practicable, uniform, fair, reasonable, and adapted to the needs of the people according to local conditions. "A law is general and uniform that applies to all persons and things coming within its provisions throughout the state. Its uniformity consists in the fact that no person or thing, of the description, of any persons or thing affected by it, is exempt from its operation." *Heck v. State*, 44 O. S., 536, 539.

The supplement to Section 917, Revised Statutes (91 O. L., 376), passed upon in *State v. Comm'rs*, 9 C. D., 90, clearly limited the counties in which folding circulars should be used without any means for adapting other counties, by reason of changed conditions, to its provisions.

On account of the distinctions which the court has endeavored to make above, this case is not like the Saturday half holiday case passed upon in Cuyahoga Circuit Court (37 Bull., 194), as well appears when a careful consideration is given to the quotation cited by relator from *State v. Hammer*, 42 N. J. L., 435, as follows:

"But the true principle requires something more than mere designation by such characteristics as will serve to classify. For the characteristics, which thus serve as the basis for classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject-matter of the proposed legislation between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the leg-

islation. Or to state it differently though not so well, the true practical limitation of the legislative power to classify is, that the classification shall be upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation in respect to them."

The issues are found with the defendant, the Lorain Democrat Company, and the petition of the relator is dismissed.

ASSIGNMENT OF INTEREST IN OPTION TO PURCHASE LAND.

Common Pleas Court of Cuyahoga County.

O. P. McILRATH v. JOSEPH ZELASNY ET AL; and JOSEPH ZELASNY v. JOHN STAFFELD.

Decided, January 30, 1912.

Specific Performance—Where Interest in a Privilege of Purchase was Assigned—And the Property was Sold to Another than the Assignee—And the Owner of the Fee, into Whose Lease the Privilege was Incorporated, Refused to Accept the Purchase Price.

1. The contract between Z and M, set forth herein, conveyed to M a one-half interest in the privilege of purchase of land held by Z under a lease, and M is entitled to one-half of the profits from the sale of said land, whether sold by himself or by Z.
2. The contract made by Z for sale of said land is the only contract for the sale thereof which is enforceable, and M is entitled to his share of the profits arising therefrom.
3. The lessor having refused to accept the amount named in the lease upon tender thereof, interest will not be allowed to him on said amount, and the purchaser standing ready to take the land at the price so named will not be required to pay interest on the amount of his tender.
4. Costs of the present litigation will be assessed against the balance of proceeds remaining from the sale of the land over and above the purchase price named in the lease.

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McIlrath v. Zelasny.

James A. Wilson and A. W. Lamson, for plaintiff.

Blandin, Rice & Ginn, James A. Wilson and P. E. Dellenbaugh, contra.

ESTEP, J.

On the 4th day of April, 1905, Joseph Zelasny leased from John Staffeld 86 2-3 acres of land, situated in the township of Warrensville, county of Cuyahoga and state of Ohio. Said lease was for the term of ten years, and contained an option providing that Staffeld would sell said property to the said Zelasny at the price of \$150 per acre, at any time within five years from the beginning of said term of ten years.

On the 30th day of June, 1909, about ten months before the expiration of said option, the said Zelasny signed an agreement in writing as follows:

“SOUTH EUCLID, OHIO, June 30, 1909.

“As I, Joseph Zelasny, occupy under lease 86 2-3 acres in lot 10 in North Warrensville, Cuyahoga county, Ohio, owned by John Staffeld, and as I now have an option on said 86 2-3 acres of land given by said Staffeld to me which expires April 4, 1910, to purchase said farm for the sum of \$150 per acre, I hereby assign to O. P. McIlrath a one-half interest in said option, McIlrath to push the sale of said farm, pay all the expenses for advertising, and when sold said Zelasny and said McIlrath shall divide equally between them the profit derived from the sale of said farm.

“(Signed) Joseph Zelasny.”

During the trial the defendant, Zelasny, was permitted to file an amended answer, in which he prayed that said agreement be set aside on the ground that it was procured by fraudulent representations on the part of said McIlrath. The said fraudulent representations consisted in puffing himself in so far as his financial standing was concerned. These representations are denied by the said McIlrath, and I am not able to say that they were made. In coming to this conclusion I have considered the fact, that between the time of the making of said agreement and the time of filing the amended answer no claim, according to all the proof in the case, was ever made by Zelasny that the agree-

ment or assignment had been obtained from him by any fraud on the part of the said McIlrath.

After the execution of the agreement of June 30, 1909, the said McIlrath began to advertise the property in the Cleveland papers, and took persons out to view the premises. He testifies that he received an offer of \$175 per acre from one Fred Goakes, and after advising Zelasny of this offer they agreed that the farm ought to bring \$200 an acre, and the bid of Goakes was rejected.

It further appears from the evidence that on or about the middle of November, 1909, McIlrath negotiated a sale of said farm to one T. A. Lamb. Clifford A. Fuller acted for the said Lamb, and agreed to buy said farm for the sum of \$200 per acre, paying \$5 on said purchase price and taking a receipt therefor. The said Fuller testified that if said Lamb did not take said property, he was willing to take it himself at the price of \$200 per acre, as that, at the time he dealt with McIlrath, was the fair value of said property.

On the 16th day of November, 1909, McIlrath wrote Zelasny that he had sold said farm to Lamb for the price of \$200 per acre, and requested him to call at his office. Zelasny not coming to his office in response to said letter, McIlrath sent his son and J. A. Wilson out to see him. Afterwards Zelasny called on McIlrath, and told McIlrath that he had better hold up the sale for a few days, as he, Zelasny, had a man at Chagrin Falls who might buy at \$210 per acre. At the time of the talk it appears from evidence that Zelasny had given to one Frank C. Newcomer an option on said land at \$175 per acre; that said option was dated on the 27th day of September, 1909, and was to expire December 1, 1909; that the same was extended November 29, 1909, until April 4, 1910; and that on April 4, 1910, the said Newcomer elected to exercise the option and tendered Zelasny \$15,166.66 in payment for said premises. The fact that Zelasny had given said option to Newcomer was concealed from said McIlrath until about November 23, 1909, at which time McIlrath placed his agreement with Zelasny on record. Newcomer at that time had knowledge of said agreement.

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There is a claim made on the part of Zelasny that W. A. McIlrath, a brother of O. P. McIlrath, who had something to do with procuring the said T. A. Lamb as a purchaser, wanted him to divide the profits into three parts, which he refused to do. He also claims that the said O. P. McIlrath wanted the same thing done. The McIlraths vigorously deny this. I am not satisfied that such demand as this was made on Zelasny. When we consider that at this time Zelasny had given an option to Newcomer, and was concealing this most important fact from McIlrath while he continued to recognize McIlrath's rights under the agreement of June 30, 1909. I am not inclined to give much weight to his testimony on this subject.

There are technical legal objections to carrying out the agreement between McIlrath and Lamb or McIlrath and Fuller, and specific performance of this purchase can not be enforced. I have considered these matters, however, as bearing upon the efforts made on the part of McIlrath to carry out his part of said agreement in good faith. I am satisfied that if Zelasny had not made the agreement with Newcomer to sell the property for \$175 per acre, McIlrath could have sold it for \$200 per acre, and thereby doubled their profits.

Upon all the proof in this case, I have reached the following conclusions:

1. The contract of June 30, 1909, in my opinion, conveyed to O. P. McIlrath a one-half interest in the option owned by Zelasny relating to the right to purchase the 86 2-3 acres of land described in the lease between Zelasny and Staffeld; and that McIlrath, having performed the consideration mentioned in said agreement, is entitled to one-half of the profits derived from the sale of said land, and that he is entitled to the one-half of said profit whether the land was sold by himself or Zelasny.
2. The contract made between McIlrath and T. A. Lamb with Fuller, his agent, or the offer of Fuller to buy said land at the price of \$200 per acre, can not be specifically enforced.
3. There are no reasons existing to prevent a decree ordering Staffeld to convey the said premises to Zelasny, on payment to Staffeld of \$13,000.

4. Frank C. Newcomer is a party defendant to these proceedings, and has filed an answer. His contract with Zelasny of September 27, 1909, is in evidence, and his willingness and ability to take the property are shown. O. P. McIlrath is asking that this agreement, if the court finds it is the only one which can be carried out, be specifically enforced. Can this be done?

In the case of *Coffinberry v. Oil Company*, 68 O. S., at page 497, Price, J., says:

"It is a familiar rule for which we have numerous precedents, that the ordering of specific performance is in some measure within the sound discretion of the court when it is asked; and there are many cases which disclose circumstances of inequality and hardship or other considerations which lead to a refusal of the specific relief, and yet adequate justice is done in some other form in the same case, in order to avoid other actions and settle the rights of the parties." * * *

In the case of *City of Tiffin v. Shawan*, 43 O. S., 178, the second syllabus is as follows:

"If a contract for the purchase and conveyance of land is in all respects fair and free from ambiguity, and its enforcement, as against the purchaser, will vest in him a marketable title, the court has no legal discretion to refuse its enforcement."

The general doctrine, however, is laid down on page 183, where Owen, J., says:

"The duty of a court to decree specific performance of a contract can not be determined by any iron rule, but depends upon the peculiar facts and equitable considerations of each case, and rests in the sound discretion of the court, guided and regulated, so far as may be, in the exercise of that discretion, by precedent and established practice."

See also *Brock v. Hidy et al*, 13 O. S., 306; *Port Clinton R. R. Co. v. C. & T. T. T. Co.*, 13 O. S., 549.

From the authorities above cited, I am of the opinion that a decree of specific performance, on the prayer of the plaintiff, O. P. McIlrath, can be made in carrying out the contract of September 27, 1909, between Frank C. Newcomer and Joseph Zelasny.

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I therefore, conclude, that O. P. McIlrath is the owner of one-half of the option purchased by him from Zelasny on June 30, 1909; that the defendant Staffeld should be ordered to convey the said premises to Zelasny upon payment to him by the said Zelasny of the sum of \$13,000, that Zelasny, on receipt of \$13,000 paid to him by the said Newcomer, be ordered to convey the said premises to the said Newcomer; and that said Newcomer, out of the balance in his hands due upon said purchase price, to-wit, the sum of \$2,166.66, pay the court costs incurred in this litigation, and divide the remainder between the said O. P. McIlrath and Joseph Zelasny equally.

Staffeld having refused to accept the \$13,000 tendered him, I am of the opinion that he is not entitled to interest on said sum. Newcomer being willing to perform at all times, I am of the opinion that he should not be compelled to pay interest on his tender.

THE VICE OF ALLEGING BOTH WILLFULNESS AND NEGLIGENCE.

Common Pleas Court of Hamilton County.

AUGUST HOPMAN V. THE INTERURBAN RAILWAY & TERMINAL CO.

Decided, January 22, 1912.

Pleading—As to Acts which were Willful and Acts which were Negligent—Doctrine of the Last Chance—Plaintiff Required to Elect.

Where a plaintiff alleges that the wrongful act complained of was both willful and negligent, a motion to require him to elect upon which he will rely will be granted, not because willfulness is always incompatible with negligence, but for the reason that the plaintiff's petition should contain allegations which unconditionally—and not alternatively—preclude his own negligence as a directly contributing cause of the injury.

Thos. L. Michie and Prescott Smith, for the motion.

Frank Dinsmore and Chas. M. Leslie, contra.

HUNT, J.

Plaintiff alleges that the defendant willfully and negligently caused the act complained of in the petition. The defendant has filed a motion to require the plaintiff to elect.

The fact that the wrongful act of the defendant may have been willful, precludes the defense of contributory negligence, not because the acts of the defendant might not be regarded as negligence, but because the negligence of the plaintiff is thereby precluded as a directly contributing cause of the injury.

The doctrine of "last chance," applying the rule that the defendant can be presumed to intend the natural consequences of his act under known circumstances, includes (but not necessarily in all cases) the idea of intention or willfulness. A petition alleging willfulness, sufficient under the doctrine of "last chance," does not preclude an answer setting up contributory negligence conditioned upon the non-existence of knowledge of plaintiff's peril, and therefore of intention, actual or presumed. Only however upon the assumption that the allegation of willfulness, is intended to make the petition sufficient under the doctrine of "last chance," is willfulness material to plaintiff's cause of action.

If such is plaintiff's intention, the facts should be more specifically alleged. If plaintiff has no such intention it should be stricken out.

The motion to require the plaintiff to elect is therefore granted, not because willfulness is always incompatible with negligence, but because the plaintiff's petition should contain allegations which unconditionally, and not alternatively, preclude his own negligence as a directly contributing cause of his injury.

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Bernhardt v. Wise.

THE PROHIBITION AGAINST BAKERIES LOCATED IN CELLARS.

Common Pleas Court of Hamilton County.

JOSEPH BERNHARDT V. EDWARD WISE, A CONSTABLE.

Decided, April 26, 1912.

Constitutional Law—Police Power—Property Rights—Classification of Cellars and Basements—Legislation Having Prospective and Retrospective Application—Measures for Promotion of Sanitation and the Public Health—Habeas Corpus.

The provision of Section 1012, P. & A. Anno. G. C., prohibiting the use of cellars or basements for bakeries is a reasonable exercise of the police power of the state, and is not rendered unconstitutional by reason of its application to bakeries so located prior to the enactment of this particular provision.

Powel Crosley and John C. Rogers, for petitioner.

John A. Deasy, contra.

GORMAN, J.

This is a proceeding in habeas corpus. The plaintiff on the 26th day of February, 1912, filed his petition in this court against the defendant, a constable in and for Cincinnati township, Hamilton county, Ohio, alleging that he, the plaintiff, is unlawfully restrained of his liberty by the defendant, and praying that a writ of habeas corpus may issue to said defendant, and that the plaintiff may be discharged from such illegal restraint on final hearing. The petition is in due form, and there is attached thereto a copy of an affidavit and warrant under which the plaintiff was arrested and detained.

The defendant answered setting up that he is a duly elected and qualified constable of Cincinnati township, Hamilton county, Ohio, and that he has the body of the petitioner, Joseph Bernhardt, in his custody by virtue of a warrant issued by one Harry D. Armstrong, a justice of the peace in and for Columbia township, Hamilton county, Ohio. A copy of the warrant is set out given under the hand and seal of the justice of the peace. There is also set out a copy of the affidavit upon which

the warrant for the arrest of the petitioner is based. The defendant constable justifies the arrest and detention under the warrant, which it is admitted is not defective and was duly issued upon the filing of the affidavit. The copy of the affidavit set out in the answer discloses that the arrest was made at the instigation of one Eugene Franck, state inspector of bake shops, for the state of Ohio, and in the affidavit, he charges that the petitioner on or about the 16th day of February, 1912, at the county of Hamilton and state of Ohio did then and there use a cellar as a bakery, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Ohio.

The petitioner has replied to the answer of the constable in which he admits that he is detained by virtue of a warrant held by the defendant Wise, as constable, and admits that said warrant was issued by virtue of Section 1012 of the General Code of Ohio. The petitioner further avers that he is a baker and engaged in the bakery business at 110 East McMicken avenue in the city of Cincinnati, and that the oven of said bakery used by him is in the basement of said premises and that said basement or cellar has been devoted to the use of his bakery since 1890, long prior to the passage of Section 1012 of the General Code. He further avers that his said bakery is and always has been constructed and operated upon and under all proper and sanitary rules, regulations and orders of the proper authorities of the city of Cincinnati and the state of Ohio, and that the reports of the board of health of the city of Cincinnati show that the petitioner's cellar bakery is of the highest class, established by said board, namely, AA, and that he has a vested property interest in his bakery plant so located in said basement or cellar; that the same cost him a very large sum of money to construct and equip, and that it would cost him a large sum of money to be compelled to abandon said bakery and to construct another above the street level, and that he would by abandoning said bakery and removing from said premises suffer a large loss of trade and good will of his business, which he has built up at his present place of business at a large expense of time and money; that he resides with his family on said premises above

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said bakery, and if compelled to remove his bakery would also be compelled to remove his residence. He further avers that the bakery goods baked in said cellar bakery are as healthful as if such goods were baked in an oven located above the street level. The petitioner further avers that in the baking of his bakery goods he applies a heat of from 350 to 450 degrees Fahrenheit, thereby destroying all bacteria and other impurities in any manner likely to affect the bakery goods produced by the petitioner; that he has complied with all the rules, regulations and requirements of the state and of Cincinnati, keeping clean the floors, sidewalks, ceilings, woodwork, pans, cupboards, and all utensils and machinery used in said bakery; that he keeps the same well lighted and ventilated, adequate plumbing, and in every other respect complies with all the requirements of the state law and the city ordinance with reference to sanitation in his said bakery. He further avers that the healthfulness of his bakery goods does not depend upon the location of the said bakery, but depends upon the application and rigid enforcement of stringent rules and regulations as to plumbing, ventilation, cleanliness of all oven utensils, rooms, receptacles, machinery and employes used or employed in or about the production of bakery goods, whether so employed above or below the street level.

Plaintiff further avers that there are over one hundred so called cellar bake shops in the city of Cincinnati which cost the owners large sums of money, aggregating a hundred thousand dollars, and which have been in use for many years and prior to the passage of Section 1012 of the General Code in its present form. The petitioner further avers that there are many rathskellers, restaurants, hotels, boarding-house kitchens and other places in which baking and cooking are done, and eatables and drinkables prepared for public consumption, in the city of Cincinnati, located in part or wholly below the street level, and that no statute has been passed by the General Assembly of Ohio prohibiting such places from being used for such purposes, and that Section 1012 of the General Code discriminates against bakeries alone, and for that reason is unconstitutional and void, as not being a law having a uniform operation through-

out the state. The complainant further avers that said Section 1012, General Code, has no application to his bakery, because he had a vested right therein at the time said Section 1012 of the General Code was passed and became a law of this state. He further avers that said Section 1012 of the General Code is unconstitutional and void as being in contravention with Article I, Section 1 of the Bill of Rights of the Ohio Constitution, and contrary to the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

A demurrer was filed to this reply and the cause was submitted to the court upon the arguments of counsel and voluminous briefs.

There are two questions raised by the demurrer to the reply, which demurrer, of course, searches the record, and under it the court may examine the petition, the answer and the reply, to determine whether or not the petitioner is illegally restrained of his liberty.

The petitioner claims, first, that Section 1012, General Code, does not apply to his bakery, because at the time of the passage of the act referred to, or rather the act of which Section 1012 is a part, it was not intended to apply to cellar or basement bakeries then in existence. Secondly, he claims that if the court should be of the opinion that this law does apply to his bakery, then the law, or a part thereof, is unconstitutional and void on the grounds: first, that the law is not uniform in its application and operation; and, secondly, on the ground that the prohibition of the use of his cellar or basement for a bakery is a taking of his property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States. We shall examine these questions in the order in which they have been stated.

The Legislature of Ohio on April 27, 1896, passed a law known as an act for the regulation of the manufacture of flour and mill food products. The act contained ten sections. On April 21, 1898, the Legislature amended this act and repealed all the sections of the prior enactment. We need concern ourselves only with the amended act. In substance the amended act provides in nine sections, for the proper sanitation, drainage, plumbing

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and all general sanitary conditions for bakeries, requiring air shafts, windows, ventilating pipes, etc., such as may be required by the chief or district inspector of bake shops. The act further provides for proper washrooms, closets, toilet rooms, etc., prescribes the height of the room, how sides of the walls should be constructed, the ceilings and the floors, kinds of furniture to be used, and many other regulations which need not here be set out. The act further provided as follows:

“And no cellar or basement not now used as a bakery, shall be hereafter used and occupied as a bakery, and a cellar heretofore occupied shall, when once closed, not be reopened, unless the proprietor shall have previously complied with the provisions of this act.”

This law was carried into Bates' Revised Statutes and numbered Sections 4364-71 to 4364-79, inclusive. No change was made in this law until the codifying commission was appointed by virtue of an act of the Legislature passed April 2, 1906 (98 Ohio Laws, 221). This commission, composed of three persons appointed by the Governor, was directed and required to bring together all the statutes and parts of statutes passed by the Legislature relating to the same matters, and to generally omit all redundant and obsolete enactments such as have no influence on existing rights or remedies, making alterations in harmonious statutes, to omit ambiguous words, and to arrange the statutes under suitable titles, divisions, subdivisions, chapters and sections, and to present the same in a general, concise and comprehensive form consistent with the clear expression of the will of the General Assembly, rejecting all equivocally ambiguous, circuitous and tautological phraseology. The commission having performed its work, submitted to the General Assembly what is known as the General Code, and this General Code was passed and adopted by the Legislature of the state as its own handiwork, February 14, 1910; so that the General Code as it now stands is an enactment of the General Assembly of the state of Ohio, in its sovereign capacity as the law making body of this state. There can be no occasion for a reference to the work of the codifying commission in view of what the Legislature subse-

quently did in adopting this code as one enactment of the Legislature except for the purpose of shedding light upon the meaning to be given to Section 1012 of the General Code.

Now Section 1012 of the General Code is a part of the enactment of the Legislature passed April 21, 1898. That enactment relating to bakeries is now found compiled within the limits of Sections 1012 to 1019 inclusive, of the General Code. Section 1019 provides that a violation of any of the provisions of this code relating to bakeries, or a refusal to comply with a requirement of the chief inspector of workshops and factories or a district inspector made as provided herein shall subject the offender to pay not less than twenty dollars nor more than fifty dollars, and not less than fifty dollars nor more than two hundred dollars, or imprisoned not more than ten days, for each succeeding offense.

The section of this code which the petitioner is charged with having violated is 1012, or rather he is charged with having violated a portion of that section, by using and conducting a bakery in a cellar, contrary to the provisions of this section, which reads as follows:

"All bakeries shall be drained and plumbed in a sanitary manner and provided with such air-shafts, windows or ventilating pipes, as the chief inspector of workshops and factories or a district inspector directs. No cellar or basement shall be used as a bakery."

It is this last sentence of this section of the General Code which the petitioner is charged with having violated, and it is this part of the section which it is contended does not apply to the petitioner's bakery; and if so, then the prohibition contained in this language is an unconstitutional enactment. It is argued and contended by counsel for the petitioner that by taking the enactment of April 21, 1898, it will be seen that the Legislature provided that no cellar or basement not then used as a bakery should be thereafter used or occupied as a bakery, and that it was not the intention of the Legislature, nor did it so enact that a cellar or basement which was then used as a bakery should not continue to be used as a bakery. In other words, it

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is contended that the act of 1898 was prospective in its operation and intended only to apply to those cellar or basement bakeries which might be opened after the passage of the law, and that inasmuch as the codifying commission was only authorized to bring together all the statutes, simplify the same and reject all unnecessary language, the commission when it wrote Section 1012, or the last sentence thereto, simply stated in substance what the Legislature had provided by the act of April 21, 1898, and that the Legislature when it adopted the work of the Code Commission as its own did no more than re-enact that part of the law of 1898 which applied to cellar and basement bakeries.

Now, let us analyze the language of the Legislature in the act of 1898 and see what the Legislature did. It is true, I think, and can not be controverted, that the act intended to apply to the bakery business as it should be conducted after the passage of the act of 1898. It was purely and simply a regulation of the bakery business and so intended. It had no retrospective operation or effect, but merely prospective. The Legislature divided cellars and basements into two classes by this act of 1898. One class was cellars and basements then used as bakeries, that is, used as such at the date of the passage of the act of April 21, 1898; and the other class, cellars and basements not used as bakeries at that time. Now the Legislature provided that cellars and basements not then used as bakeries could not be thereafter used as such; but did not prohibit cellars and bakeries then used as bakeries from being so used thereafter. But the Legislature further provided in this act that when a cellar or basement bakery was discontinued or closed, that it could not be reopened, unless the proprietor shall have previously complied with the provisions of the act, which could only mean, complied with the provision of the acts with reference to alterations and changes and with respect to ventilation and sanitation.

Now, the codifying commission and the Legislature, by the language of Section 1012 of the General Code, have substituted for all this language the prohibition, "no cellar or basement shall be used as a bakery." If this language in Section

1012 has the same force and effect as the language in the act of 1898, then the complainant's contention is well founded, that the law does not apply to his bakery, because it is admitted that his bakery in his cellar was in existence and operation at the time of the passage of the act of 1898, and also at the time of the adoption of the General Code in February, 1910.

It seems to the court that the language of Section 1012, which prohibits cellar and basement bakeries, is not the same as the language used in the act of 1898, nor can it be construed to mean the same thing. By the language of the last sentence of Section 1012 of the General Code, there is no classification of or exception to cellars and basements. No cellar or basement can be used as a bakery under this language whether it was theretofore used as a bakery or not, whereas by the language of the act of 1898 the prohibition extended only to cellars and basements which were not then used as bakeries, and cellars and basements which were then used as bakeries could continue to be so used.

There has been an elimination of the classification of cellars and basements which is found in the act of 1898. If the language of Section 1012 were employed in the act of 1898, then no bakery could be carried on in any cellar or basement, whether the business was then in existence or not.

As the court understands this act, it was not an act to regulate property, but an act to regulate business, to-wit: the business of baking food stuff for the people; and it was undertaken to prescribe that the business should not be carried on in certain places, which no doubt the Legislature contemplated were not suitable for the conduct of such business. Cellars and basements are not as open to the sunshine and the air, and are more subject to dampness and mouldiness, and I think it will be generally admitted that food stuffs, especially bread stuffs, can not be as well kept in cellars, as above ground; nor can the materials out of which bread stuffs are made retain their purity as well in cellars and basements as above ground.

Now, I am clearly of the opinion that the codifying commission and the Legislature, by changing the language of the act

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of 1898, has made the prohibition apply not only to bakeries that were conducted and carried on in cellars and basements at the time the act of 1898 was passed, but it has made the prohibition extend to the carrying on of the bakery business in any cellar or basement regardless of the time when the business was established, whether prior to the adoption of the General Code in 1910, or thereafter. It is analogous to the situation which is presented by a person who is engaged in the business of trafficking in intoxicating liquors.

One may be engaged in that business of retailing intoxicating liquors on his own premises, without violating any law of the state, but under the local option law the people of the district in which his saloon is situated, may by a majority vote determine that he shall not carry on that business in that place, and upon an election being held as provided by law, if the majority of the electors in the district in which the saloon is located so express themselves the person or persons engaged in the saloon business must discontinue the business, and they are prohibited from opening up or carrying on the business thereafter. The Supreme Court has decided that such an enactment is a valid exercise of the police power by the Legislature, and that such legislation is in the interest of good morals of the state. The Legislature may also provide, under the police power, that dynamite and gunpowder shall not be stored in localities where any danger is likely to result to persons and property. The Legislature may also provide that slaughter-houses and other establishments where the business carried on has a tendency to endanger the health, or annoy, or become offensive to the sense of smell of the inhabitants of portions of the community shall not be carried on in those places. And no doubt the Legislature when it passed this act, and the codifying commission and the Legislature when it re-enacted the General Code, had in mind the purpose or intention of passing laws in the interest of the public health.

Now the question arises, whether or not this enactment, which the court construes to be a prohibition to the carrying on of the bakery business in any cellar or basement, is a valid and con-

stitutional exercise of the police power vested in the Legislature, or whether or not it is a violation of the guarantee extended to all the citizens by Section 1 of the Fourteenth Amendment of the Constitution of the United States. That section, or the part thereof with which we are concerned, reads as follows:

“Nor shall any state deprive any person of life, liberty or property without due process of law.”

It is contended that the bakery business is a lawful and harmless business, and that no evil arises out of the business; that it is not a nuisance and can not be declared to be a nuisance, and that the extent to which the Legislature may act under the exercise of police power is to provide proper sanitary regulations for the conduct of the business and that it can not prohibit the carrying on of the business in any place or locality. If this be true, then the last portion of Section 1012 of the General Code must be held to be unconstitutional as in violation of the guaranteed right of the petitioner under this article of the Constitution of the United States. Now we shall proceed to examine this question.

I am of the opinion that Article I, Section 1 of the Bill of Rights of the Ohio Constitution, which provides that all men have certain inalienable rights, among which are those of enjoying and defending life, liberty, acquiring and possessing and protecting property, is not contravened by this section of the statute. Nor is Section 19, Article I of the Bill of Rights of the Constitution of Ohio, violated by this act. That section among other things provides that “private property shall ever be held inviolate and shall not be taken without compensation made to the owner in money.”

This legislation, in the opinion of the court, falls within the class of legislation which may be enacted under the police power of the state, and the only question as to its constitutionality is whether or not it is violative of the Fourteenth Amendment of the Constitution of the United States, which among other things prohibits any state from depriving any person of life, liberty and property without due process of law. To the extent that the petitioner's property in this case is limited in the uses to

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which it may be applied, there is to that certain extent a deprivation of property.

When the use of a property is prohibited, it is the equivalent of the taking of the property; and if this use is prohibited without due process of law, then, in the opinion of the court, there has been a taking of private property without due process of law. But in the exercise of the police power by the state, which by the way is a power that is not interfered with by the Fourteenth Amendment of the Federal Constitution, persons and property, liberty of movement and freedom of action, are subject to a limited control; and a limitation may be put upon the use of property and the use of one's liberty. This it has been held by all the authorities may be done, provided the limitation upon the liberty of the citizen or upon the use of his property is not an unreasonable one and tends to promote the general welfare, the public health, comfort, and protect the lives and security of the people.

The sole question to be determined in this case is whether or not the last sentence in Section 1012 of the General Code, which prohibits the use of bakeries in cellars and basements, is a reasonable exercise of the police power of the state. While the Fourteenth Amendment guarantees due process of law and equal protection of the laws, and is capable of an interpretation subjecting state legislation to a federal control nearly equal in scope to that now exercised by the state courts, nevertheless the view expressed by the Supreme Court of the United States in the "slaughter-house cases," 16 Wallace, that the chief application of this clause can be found in the protection of the negro, was for many years considered to be the true interpretation of this amendment. But in later years the rule therein laid down has been widely departed from, and it is now held by the Supreme Court of the United States that this amendment may be invoked for the purpose of protecting the liberty and property of the individual citizen who claims that he has been deprived thereof without due process of law. It is not an easy matter to define what is meant by due process of law. In Great Britain it simply means that it is a judgment in accordance with the

forms, practices and precedents of the courts of Great Britain; or it means an act of Parliament. No court can question the validity of an act of Parliament. But in this country and in all the states thereof, by reason of the fact that we have a written constitution adopted by the people of the United States and of the different states, the courts have taken to themselves, if it has not been conferred upon them, the power and authority to determine the validity of any act of the legislative department of the government. Therefore, in determining whether or not property has been taken without due process of law in this country and in this state, reference must be made to the constitutional provisions affording protection to property and prohibiting the taking thereof in any other manner than that prescribed by the fundamental law of the land.

According to the broad and equitable doctrine of modern cases, it is not necessary to constitute a taking of property for public purposes that the actual occupancy or possession of the property should be assumed and its title acquired. A serious interruption to the common and necessary use of property is said to be equivalent to taking it, within the meaning of a constitutional provision and it is not necessary that the land should be absolutely taken. See *Pumpelly v. Green Bay, etc., Canal Co.*, 14 Wal., 166.

The term "police power" has never been clearly circumscribed. Blackstone defines it as "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners; and to be decent, industrious and inoffensive in their respective stations." Blackstone, Vol. 4, 162-175.

In the decisions of the courts of the various states and the Supreme Court of the United States, we find the term "police power" coupled with internal commerce and domestic trade, health and safety measures, legislation relating to gambling, game laws, idleness, disorderly houses, proper mode of living, the conservation of health, the honor and cleanliness of the

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people and a multitude of subjects over which it is admitted that the state has ample authority under this power to exercise its paternal care. It is also universally conceded that it is a power to be exercised by the states and not by the federal government; and the only grounds on which the federal courts undertake to pass upon legislation of the character of police regulations, is when the claim is made that the legislation is violative of the Fourteenth Amendment.

The legislation of which Section 1012 of the General Code is a part is an exercise of the power of the state to provide for the health of the people and the conservation of the strength and health of the persons employed in bakeries. The act under consideration was copied almost verbatim from an act passed by the Legislature of the state of New York, which was considered in part in the case of *Lochner v. The State of New York*, 198 U. S., 45. This act of the Legislature of New York undertook to regulate bakeries, to prescribe the number of hours of labor which bakers could be required to perform in any one day, provide for the sanitary conditions of all bakeries and for inspection thereof, for wash-rooms, and limiting hours of labor to sixty hours a week and not more than ten hours a day. The act also provided that no cellar or basement not used as a bakery at the time of the passage of the act should thereafter be used or occupied as such, unless the proprietor shall comply with the sanitary provisions of the act. An examination of the various sections of this act, which will be found set out in full in the case just cited, will disclose a great similarity to the sections of the General Code of Ohio, 1012 to 1019 inclusive.

The case above cited arose in Oneida county, New York, where one *Lochner* was indicted and convicted in the Supreme Court in that county of having required a baker to work more than sixty hours per week in his (*Lochner's*) bakery. A demurrer was interposed to the indictment on the ground that the law was invalid and void because in contravention of the Fourteenth Amendment of the Federal Constitution. It may be interesting to show the diversity of opinion of the judges who passed upon this legislation. The constitutionality of the law

was upheld by the judge of the Supreme Court of Oneida County. On appeal to the Appellate Division of the Supreme Court of New York the constitutionality of the law was sustained by a divided court of three to two. In the Court of Appeals of New York, composed of seven judges, the judgment of the Appellate Division of the Supreme Court was affirmed by a divided court of four to three, and on error to the Supreme Court of the United States the judgment of the Court of Appeals of New York was reversed and the law held to be unconstitutional by a divided court of five to four; Justices Harlan, White, Holmes and Day concurred in a dissenting opinion, whereas five of the judges, Peckham, Fuller, Brewer, Brown and McKenna, held that a part of the law was invalid as an invasion of the constitutional right, without due process of law, of the accused, Lochner, to contract. The constitutionality of this part of the enactment was sustained by twelve judges who passed upon it, and it was held to be unconstitutional by ten judges; but inasmuch as the Supreme Court of the United States had the last say, and five of the judges held the law to be unconstitutional as against four who held it to be constitutional, that provision of the law which prohibited persons from laboring in bakeries more than sixty hours per week was held to be invalid. The remaining parts of the statute were not affected by this decision.

Without undertaking to criticize the wisdom of the holding of those judges who held the law to be unconstitutional, it would appear that there was grave doubt as to the unconstitutionality of the legislation, to say the least. As was said by Justice Holmes in his dissenting opinion:

“A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable, would uphold it as a first installment of a general regulation of the hours of work.”

It is an elementary principle of law that courts must not hold any legislation unconstitutional unless it be clearly so, and that every reasonable intendment shall be held to favor the validity and constitutionality of an act of the Legislature. If there be

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any reasonable doubt as to the constitutionality of an act of the Legislature, it is the duty of the court to resolve that doubt in favor of the validity of the law and not against it; and the duty to so hold and apply this rule rests with special force upon the judges of the inferior courts, courts below the court of last resort. In this case before the court, if there is any reasonable doubt as to the constitutionality of this legislation, it would be my duty to sustain it.

The strongest case that has been cited by counsel for the petitioner in support of their contention that this law is unconstitutional is *In re Jacobs*, 98 N. Y. Rep., 98. The Court of Appeals of New York in that case had under consideration an act which prohibited and made criminal the manufacturing of cigars in tenement houses, and it was sought to uphold the legislation as a valid exercise of the police power of the state for the conservation of the health of the occupiers of tenement houses. It was attacked upon the same ground that the bakery act under consideration in this case is attacked, to-wit, that it was a violation of the constitutional guarantee afforded by the Fourteenth Amendment of the Federal Constitution, in that it deprives the occupiers of tenement houses of their property without due process of law. In that case the court held that property may be destroyed or its value annihilated, if the owner is kept from using it for a useful and lawful purpose. It further held that the value of property consists in the right to use the property, and that the constitutional guarantee would be of little worth if the Legislature could, without compensation, deprive property owners of the right to use the same for any lawful purpose. In that case numerous authorities were cited supporting the doctrine that the Legislature, in the exercise of the police power, has the right to limit in a reasonable manner the uses to which property may be put, if the limitations of those uses tend in any way to further the purpose for which the legislation was intended. But in that case, the Supreme Court was of the opinion that there was nothing deleterious or unwholesome in or about the manufacture of cigars in tenement houses, and that the prohibition of the manufacture of cigars therein did not

tend in any manner to protect the health of occupants of tenement houses.

Judge Cooley lays down this rule in the 4th Ed., Section 719, of his Constitutional Limitations:

"The limit to the exercise of the 'police power' in these cases must be this: the regulations must have reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise."

Generally, it has been held that it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public safety, and if its measures are calculated, intended, convenient and appropriate to accomplish this end, the exercise of its discretion is not subject to review by the courts; but they must have some relation to those ends. Under the mere guise of police regulations, personal rights and private property can not be arbitrarily affected, and the determination of the Legislature is not final and unreviewable.

If we are to determine the validity of this act of the Legislature under consideration, Section 1012, by this act, we must ask ourselves whether or not the legislation has any relation to the end sought to be accomplished by the Legislature. Now, it is manifest that the purpose intended to be accomplished by the Legislature or the end sought to be attained, was the preservation of the health of the inhabitants of this state. All people of the state use bread, and it can not be denied that it is desirable and essential that the bread used by the people should be as wholesome as it is possible to make it. Wholesome bread conduces to good health, and unwholesome bread very materially conduces to ill-health. Furthermore, it was no doubt in the mind of the Legislature to conserve the health and strength of employees in bakeries.

Now can it be said that the prohibition of bakeries in cellars and in basements has no relation towards securing the health of

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the people of the state and the health and strength of the employes in bakeries? It must be known to any court who undertakes to pass upon legislation of this character, that cellars and basements are not as sanitary because of their location as are rooms and apartments entirely above the ground; nor can they be made as wholesome as rooms and apartments entirely above ground. There is always more or less dampness in rooms under ground or partly under ground; there is always a limitation to the amount of light that may be admitted to such rooms; there is a limitation to the amount of wholesome air that may be admitted; and there is a limitation to the amount of sunshine that may be secured in such places.

The court is of the opinion that it can not be said in this case that the prohibition of bakeries in cellars and basements has no relation whatsoever to the health of the inhabitants and the strength and health of the employes in bakeries. If this legislation has any relation to the end sought to be attained by the Legislature, then the Legislature is the sole judge of whether or not that end will be attained. It may be that, in the opinion of this court, neither the health of the inhabitants nor of those employed in the bakeries will be furthered or promoted by prohibiting bakeries in cellars or basements, but if every judge upon every bench in the state of Ohio was of that opinion, and nevertheless reasonable men might be found who hold to the contrary opinion, it would not be within the province of the court to hold the law unconstitutional on the ground that it is an unreasonable exercise of the police power. If reasonable men might differ as to the efficacy of the law, then the law must be held to be constitutional, because the Legislature is presumed to be composed of reasonable men, and if in their opinion it will tend to bring about the ends which they seek to attain, it is not for the court to set up its judgment and opinion as to the efficacy of the law against the judgment and the opinion of the legislative body. Even as a police regulation for the conservation of the health and strength of those who labor in bakeries, I am of the opinion that a court in the exercise of a sound judgment would not be warranted in saying that the Legislature

has no right or power to prohibit the carrying on of bakeries in cellars and basements. The court is inclined to agree with the judgment of Justice Holmes, in *Lockner v. State*, 198 U. S., *supra*, that "this case is one that may be decided from an economic standpoint." He says that "if it were a question whether I agreed with the economic theory, which a large part of the country does not entertain, I should desire to study it further and long before making up my mind."

Again he says:

"It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract."

He cites the Sunday laws, usury laws, laws prohibiting lotteries, the post office laws and regulations, and finally concludes that if reasonable men might think any legislation a proper measure to secure the health, comfort or general welfare of the community, then it is not within the province of the court to hold the law unconstitutional.

A recent case decided by the Supreme Court of Wisconsin, *Benz v. Kremer*, passes upon the constitutionality of an act similar to the one under consideration. The case will be found reported in the 26th L. R. A. (N.S.), 842, decided February 22, 1910. This act is somewhat similar to the one under consideration. It prohibited bakeries in a room, the floor of which was more than five feet below the level of the surface of the adjacent ground. An injunction was sought by one Makielski, the owner of the property, and one Bentz, the tenant of the property using the same as a bakery in the city of Milwaukee, against the defendant, Kremer, as state bakery inspector, to enjoin him from requiring them to discontinue the use of their premises as a bakery, the same being conducted in a cellar more than five feet below the adjacent ground. The court dismissed the injunction and held the law to be a valid exercise of the police power by the Legislature. It was further contended in this case that the plaintiff's bakery was constructed after the passage of the law

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requiring the floor to be not more than five feet below the level of the street. The court in passing upon the law, speaks of bakeries as follows:

“That places where bread stuff for public consumption is prepared should be sanitary would not be questioned, nor that such places where sun and air are admitted would be much more so than in basements so far below the surface of the ground as to practically, or in a large degree, exclude sunlight and an abundance of pure air, and thereby render the bakery less sanitary than if constructed not more than five feet below the level of the street. * * * It is a matter that must be left to the judgment of the Legislature.”

The court further says:

“Obviously, such a regulation could not be held unreasonable when its purpose and the effect of its observance would be to promote the production of wholesome food.”

This language is especially pertinent to the claim of the plaintiff in this case, that his bakery is A 1, and one of the most sanitary bakeries in the city of Cincinnati. This same claim was made in the Wisconsin case, and note the language of the Supreme Court with reference to this claim:

“But it is said that the plaintiff’s bakery, though more than five feet below the surface of the ground, is still as sanitary as any other, because of the physical condition of the location, hence that there is no necessity for enforcing the law in the instant case. But individual cases can not determine the necessity of a general law on the subject, nor indeed rule the question of classification. The question is whether in general the public health will be promoted by the rule, and not whether isolated cases do not need such a rule. If the rule be in the interest of the public health it must be general and all within the class controlled by it.”

And in the case at bar, although it be admitted by the demurrer that the plaintiff’s bakery is sanitary, nevertheless the constitutionality of the law and the right of the plaintiff to maintain his bakery under ground can not be determined by the fact that his bakery is the most sanitary one in the city of

Cincinnati. Numerous authorities might be cited to sustain the proposition that it is the function of the Legislature to determine what reasonable measures shall be passed in the interest of the public health and the general welfare, and that courts must not and can not hold a law passed under the police power to be unconstitutional, unless it is manifestly so and does not tend to accomplish the purposes intended by the Legislature.

In deciding an injunction suit brought by the plaintiff in this case some time ago, this court in an *obiter* expressed a doubt as to the constitutionality of this law, but stated that no proper consideration of the constitutionality of the law had been given. Since this case has been submitted, the court has read numerous authorities and has considered the question of the constitutionality of the law as fully as the limited time within which he should decide this case would permit, and has come to the conclusion that in view of his position as a judge of a court inferior to that of the Supreme Court of the state, and in view of the fact, to say the least, that reasonable minds might differ as to the efficacy of this legislation to produce the results intended by the Legislature, it is not within the province of this court to hold this law unconstitutional.

One of the very recent cases decided by the Supreme Court of the United States is that of *Laurel Hill Cemetery v. The City and County of San Francisco*, 216 U. S., 358. In that case the Legislature of California authorized the city of San Francisco to pass an ordinance prohibiting burial of bodies in cemeteries located within the city limits. It was contended that there was nothing unsanitary in the burial of persons within the city limits. The ordinance recited that the burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to the public health. In deciding the case Justice Holmes, who delivered the opinion, says on page 365:

"If every member of this bench clearly agreed that burying grounds were centers of safety and thought the board of supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hy-

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pothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded." *Jacobson v. Massachusetts*, 197 U. S., 11.

On page 366, in speaking of the authority of the Legislature to limit the uses of property under the police power, he says:

"And yet again the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. Since, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western World. This is shown sufficiently by the cases cited by the court below. * * * The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion before it can expect this court to overthrow the rules that the lawmakers and the court of his own state uphold."

The Supreme Court of our own state in the case of *State, ex rel Milhoof, v. Board of Education*, 76 O. S., 297, has upheld the regulations and rules of a board of education made under Section 3986 of the Revised Statutes, authorizing them to make and enforce rules and regulations to secure vaccination, which rules prohibited any child from attending school who had not been vaccinated, and the question of whether or not vaccination was a means of preventing small-pox the court said was one for the Legislature to determine and not for the court.

So, in the case at bar, the court is of the opinion that it is for the Legislature to say whether or not the general health of the people of this state will be promoted and the health and strength of employes in bakeries will be conserved by prohibiting bakeries in cellars and basements. The farthest that this court could go would be to express a doubt as to the constitutionality of this legislation. If it be only a doubt, then the doubt must be resolved in favor of the validity of the law, in view of the

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rule heretofore referred to as applicable to courts in the determination of the constitutionality of legislation.

The limitations within which opinions should be stated will not permit the court to comment upon the numerous authorities cited in the very able briefs of counsel for the petitioner and the respondent in this case. Suffice it to say that whatever casual opinion the court may have expressed upon the hearing of the injunction suit, he is now satisfied that this legislation is not in contravention of any provision of the Constitution of the state of Ohio, or of the Fourteenth Amendment of the Federal Constitution.

The judgment of the court is, therefore, that the petitioner be remanded to the constable to be dealt with as provided by law.

HABEAS CORPUS FOR RELEASE OF A MEMBER OF THE OHIO NATIONAL GUARD.

Common Pleas Court of Cuyahoga County.

IN RE APPLICATION OF RAY JOHNSON FOR A WRIT OF HABEAS CORPUS.

Decided, April 2, 1912.

Habeas Corpus—Writ for One Held Under Color of Military Authority and Amenable to Military Jurisdiction Will be Denied by a Civil Court—Effect of the Federal Act Relating to the Militia.

1. A civil court may, in any case, inquire by what right a person is restrained of his liberty; but if it appear, upon such inquiry, that the person is held under color of military authority, and that the person restrained is amenable to the jurisdiction of the military court, the application should be denied.
2. The amendments to the act of Congress approved January 21st, 1903, entitled "An Act to Promote the Efficiency of the Militia and for Other Purposes," have only increased the authority of the United States over the organized militia of the various states, and decreased the authority of the states, but have not otherwise changed the individual status of soldiers of the organized militia.
3. It appearing that troops had been paraded by authority of a specific order from the War Department, that they might be inspected

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by officers of the United States army to determine their efficiency, the state courts will not assume jurisdiction of an application for a writ of habeas corpus to release a soldier, so ordered, from custody of the military authorities.

Thompson, Hine & Flory, for relator.

Wing, Myler & Turney, contra.

KEELER, J.

The relator made application to this court for a writ of habeas corpus, representing that he was unlawfully restrained of his liberty by the sheriff of Cuyahoga county, and that authority in law did not exist for his detention and custody by such sheriff.

It appears by the oral statements of counsel in court that none of the facts in relation to this custody are at issue. It appears that the relator, Ray Johnson, is an enlisted man of Corps of Engineers, Ohio National Guard, and is a member of the organized militia of the United States. Thus his status as being a soldier is conceded.

It appears that, under the terms of an act of Congress known as the "Dick Bill," and entitled "An act to promote the efficiency of the militia and for other purposes," first passed on January 21st, 1903, and the amendments thereto, the organized militia of all the states are required to be paraded for inspection by officers detailed for that purpose by the War Department at Washington, that it may be ascertained whether such troops are properly equipped, drilled and disciplined for participation in active service in the field in time of war.

It further appears that a part of such examination consists in the inspection of each individual man physically, to determine whether he is in a proper condition of health and strength to take the field, and mentally, to ascertain whether he has the proper training and instruction in and about his soldier duties so that he might be an efficient member of the command in war.

The relator, Johnson, was a member of this command, and was notified by order to appear at the time and place of the inspection. Johnson failed to appear in obedience to the order, and later in the evening was taken into custody by a non-com-

missioned officer of his organization and placed in confinement, from which confinement he seeks to be released by this proceeding.

This court had before it at a former term almost the identical question raised by this case, in the matter of the application of Joseph Kuchta for a writ of habeas corpus. In the Kuchta case, the relator claimed that he was not a lawful member of the military organization, and sought to question the jurisdiction of the military authorities to hold him for an alleged offense, claiming that at the time of his alleged enlistment he was not of lawful age to take the military oath. This court held that it might look into the question upon his allegation that he was not a member of the military organization, but that, upon it satisfactorily appearing to the court that this allegation could not be sustained in fact, and it affirmatively appearing that he was held under color of military authority, the writ was denied.

This court's decision was subsequently affirmed by the Supreme Court in 81 O. S., 508, the court placing its decision upon the authority of *McGorray v. Murphy*, 80 O. S., 413, and *In re Grimley*, 137 U. S., 150. It appears, however, that the decisions of the Supreme Court in both the Kuchta and Murphy cases were based upon the act of Congress before referred to, and known as the "Dick Bill," and that this act of Congress has been amended since the decision of the Supreme Court in those cases. A careful study of the amendment leads us to the conclusion that the law as amended is even more unfavorable to the petitioner than the law as it originally stood.

Congress had the undoubted authority, under the federal Constitution, to legislate concerning the militia; and the latest legislation upon this subject merely increases the authority of the federal government and decreases the authority of the several states, incidentally increasing the federal apportionments for the use of the organized militia, and relieving the states from a portion of the expense of its maintenance; so that it now appears that the organized militia of the several states are, in great part at least, clothed, armed, equipped, and in part paid by the federal government. The federal government, in so doing,

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exercised its right to inspect, at stated intervals, this equipment in the hands of the individual soldier, and it appears that this relator was ordered to appear with his command before such an inspector upon the date he was placed in custody and the day prior to the filing of this application. This inspection was for the purpose of ascertaining whether the relator was properly instructed as a soldier, and whether the government equipment in his possession as a soldier was in a condition for immediate service in the field in time of war. This inspection was very important.

Under our system of government, where military service is voluntary and our military establishment small in comparison with the vast standing armies of Europe, it is of the most vital importance that our military organization should be at all times in a condition of the highest efficiency. It is upon this broad ground of public policy that the federal courts have constantly refused to inquire into the jurisdiction of military courts in like cases, as *In re Mason*, 1905 U. S., 696; *In re Davison*, 21 Fed., 618; *In re Crain*, 84 Fed., 788.

For the various courts, of whatever district troops happen to be in, to inquire into and review the decision of courts martial, in cases of troops serving within their several jurisdictions, would be to a great extent demoralizing to military discipline, and especially in time of war would tend to weaken the military arm of the government. Moreover, by the military law as established under authority of acts of Congress, a soldier brought before a summary court martial has the right to appeal to a general court martial, and even to the commander-in-chief. If he feels himself aggrieved by a decision against him, he may have the same reviewed by a higher authority within the military establishment itself, and thus his rights are as thoroughly protected against error prejudicial to himself as the rights of a citizen are protected in the civil courts, and in a somewhat similar manner.

In the case at bar there is a stronger reason for refusing this writ than existed in either the *Murphy* or *Kuchta* cases. In those cases the relators were on duty, ordered there upon the

authority of the Government of Ohio by the Adjutant-General of Ohio. In this case the court is asked to assume jurisdiction in the case of a soldier who is performing duty under orders of the President of the United States through the Secretary of War.

Nothing can be clearer than that this court has no jurisdiction to entertain this action, and the application of the relator will be summarily denied, and he is remanded to the custody of the military court.

TAXATION OF RECEIPTS FROM JOINT ENTERPRISES.

Common Pleas Court of Franklin County.

THE STATE OF OHIO V. THE COSHOCTON GAS COMPANY.

Decided, May 11, 1912.

Taxation—Construction of the Term "Gross Receipts"—Public Utility Corporations and the Excise Tax—Contracts for Production of a Common Fund for the Benefit of the Parties Concerned.

The words "gross receipts" as used in the act providing for the collection from public utility corporations of an excise tax and penalties (101 O. L., 399) embraces only such receipts as are the property of the corporation making the payment, and do not include that part of the proceeds from a joint enterprise which have been collected and are still in hand but which belong to another.

Timothy S. Hogan, Attorney-General, for plaintiff.

F. E. Pomerene, contra.

ROGERS, J.

The action is to recover of the defendant, a public utility corporation, an alleged excise tax together with a penalty.

The petition shows, in substance, that the defendant was, for the year next preceding May 1, 1910, engaged in the business of supplying natural gas for lighting, heating and power purposes to the inhabitants of Coshocton, Ohio; that the state tax commission, by proceedings duly had, reported to the state audi-

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tor the amount of the gross receipts of the defendant theretofore by said commission determined as \$93.552 for the business done by defendant, and subject to the excise tax, for the year above mentioned: that the auditor made the levy and certified the amount for collection to the state treasury, amounting to 1.2 per cent. of such gross receipts, or \$1.122.80; that, defendant failing to pay said tax, thereupon the 15 per cent. penalty was added, amounting to \$178.42, and plaintiff prays for judgment for both sums with costs.

The answer of the defendant admits the business in which it was engaged, the action of the state tax commission and the state auditor, and its failure to pay, and further alleges, in substance, that its said business of supplying, distributing and selling gas was done under agreement with the Buckeye State Gas & Fuel Company, theretofore entered into between them, a copy of which is made part of the answer, whereby the Buckeye Company, the owner and producer of the natural gas, agreed to furnish and deliver to the defendant the gas in its lines at Coshocton, and defendant agreed to procure, construct, maintain and operate pipe lines in and through the streets of Coshocton as its business might demand, large enough to supply said gas to said city and its inhabitants desiring to purchase, to pay all necessary expenses of operation, to make all contracts with customers for gas, and to do all things necessary to manage and conduct said business, and furnish gas to customers in said city during the continuance of said contract; that it was further agreed that defendant should pay to the Buckeye company on or before the 15th of every month seventy per cent. of the gross amount or sum of money received for all gas sold during the preceding month, and should have and retain for itself the remaining thirty per cent. of said gross amount or sum so received for gas sold during the preceding month: that thereafter the agreement was changed so as to provide for a division of the gross receipts as to certain gas sold to manufacturers on a basis of eighty per cent. and twenty per cent. respectively, and as to gas sold to domestic consumers seventy per cent. and thirty

per cent. as before; that within said year the amount received from domestic consumers for gas sold by both companies, under this agreement, was \$52,130.65, and from manufacturers was \$34,446.30, besides \$5,197.38 from merchandise sold, making the total receipts of defendant, calculated according to the rate agreed upon in the contract, \$27,725.83, and no more, all of which was reported to the tax commission; and that the commission demanded that the whole receipts from sales of gas, including the percentage belonging to the Buckeye company and the merchandise sold, be reported for taxation, but defendant refused, whereupon the commission reported to the auditor the amount as gross receipts of defendant as appears above. Defendant further alleges a tender of the amount, as it claimed, due for the tax, and offers to pay the same into court.

The plaintiff demurs to the answer as not constituting a defense.

The case turns upon the construction to be given the statute passed May 10, 1910 (101 O. L., 399), as applied to the agreement between the two corporations regarding the duties of the state tax commission and the defendant in the matter of the excise tax to be charged and paid, respectively.

Section 121 of the act defines what are public utility companies, and embraces the defendant, a natural gas company, as a public utility company.

Section 46 provides:

“Any * * * corporation * * * when engaged in the business of supplying natural gas for lighting, heating or power purposes to consumers within this state is a natural gas company.”

Section 47 provides:

“Each public utility * * * doing business in this state shall annually * * * make and file with the commission a statement in such form as the commission may prescribe.”

And the next section provides for the contents of the statement.

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Section 53 provides:

"In the case of all public utilities * * * such statement shall also contain the entire gross receipts of the company, including all sums earned or charged, whether actually received or not, for the business done within the state for the year next preceding the 1st day of May, *including the company's proportion of gross receipts for business done by it within this state in connection with other companies, firms, corporations, persons or associations*, but this shall not apply to receipts from interstate business, or business done for the federal government."

Section 55 provides:

"The commission shall ascertain and determine * * * the entire gross receipts as aforesaid of each natural gas company * * * for business done within Ohio for the year just next preceding the 1st day of May," excluding receipts from interstate and federal government business.

Sections 60 and 61 provide for the report by the commission to the auditor of state of the amount of the gross receipts so determined, and the charge by the auditor of the excise tax thereon and the certification thereof to the treasurer for collection.

It is conceded that defendant falls within the class denominated "public utility companies" and for the purposes of this case at least is liable to pay an excise tax. The question in dispute is as to the amount on which such tax should be calculated; whether on the admitted facts the tax commission had the right to certify the amount it did, or should it have certified the amount as claimed by defendant?

The words of the statute, "the entire gross receipts of the company," "the company's proportion of gross receipts," (Section 53) and "the entire gross receipts as aforesaid" (Section 54), mean such gross receipts as belong to and are the property of the company and not receipts which may be in the hands of or pass through the hands of the company, but belong to and are the property of another.

The receipts which the commission had the right to report to the auditor are those which the company got in and owned as

its own property during the year mentioned, and not what it got in but someone else owned, that is, had the property right thereto and therein. The state had the right to tax the defendant on the basis of *the property* of the defendant by charging it with the payment of the proper per cent. of its gross receipts, but it had no right to levy a tax on the defendant for the property of another in its hands and to which it has no property right.

The question, then, is as to whether the gross receipts reported by the commission as the defendant's gross receipts, and made the basis of the excise tax, were such as were entirely the property of the defendant. If they were, the defendant is liable for the tax levied. If they were not, the defendant is not liable.

The contract shows that the two companies, the Buckeye company and the defendant, entered into a mutual agreement whereby they were by a combined arrangement to dispose of natural gas to the inhabitants of Coshocton. The former owned the gas and provided the means to convey it to the latter, and the latter distributed it by means which it provided and disposed of the product to its consumers, and as a result of the combined means agreed upon by the two companies, certain gross receipts were to be, as they were, obtained and divided in certain proportions. It was an agreement to enter into a common enterprise, to-wit, to sell natural gas to the inhabitants of Coshocton and to divide the gross proceeds, each agreeing to do its particular part under the agreement to effect the desired end.

The Buckeye company did not sell and the defendant did not buy the gas. This appears to be conceded by the Attorney-General in his brief.

At best the defendant had but a special property in the gas furnished and delivered to it. The Buckeye company had the general ownership in the gas at all times, and by special agreement furnished and delivered it to defendant to sell, and thereupon to account to the Buckeye company for a proportion of the gross receipts. The contract is not one of partnership, at least between the parties. Each had its separate rights and duties toward the other to carry on the common enterprise to the desired end.

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The contract was more in the nature of one between factor and principal, governed, however, by a special agreement. Defendant undertook to dispose of the Buckeye company's gas for a compensation measured by a per cent. of gross receipts, and to pay the residue to the Buckeye company. On disposition of the product by defendant, and receipt of the proceeds, the relation of debtor and creditor did not arise; rather, defendant's relation to the fund was that of trustee to its principal, unless the latter saw fit to waive that relation.

The object of the contract as contemplated by the parties was, by one performing certain parts and the other performing others under the contract, to produce a certain common fund for the benefit of both which was to belong to each in certain proportions. Neither at any time was entitled to the whole fund as a right of property, but each was entitled to a proportionate share as belonging to it. While the defendant in the conduct of the business under the contract received the gross sum, it did not all belong to defendant. The property right in seventy per cent. or eighty per cent. thereof, depending upon the circumstances, belonged to the Buckeye company, and was its gross receipts, and defendant held the same as agent for its principal.

I am clearly of the opinion that the contract between the two companies did not contemplate a sale of the gas to the defendant. If it did not, no general property right in or to the gas is vested in the defendant. It was a special right only. The defendant not having a general property right in the gas did not acquire a general property right in the proceeds of their combined enterprise, but only had a property right in the proportion of the proceeds to which, under the contract, it was entitled.

Section 53 of the act under consideration provides for a situation substantially as the one before us. It requires, in substance, that the defendant make to the commission a statement of its entire gross receipts, "including the company's proportion of gross receipts for business done by it within this state in connection with other companies." Defendant, according to the facts pleaded in its answer, has done business within this state in connection with another company whereby a gross sum has

been received by it for both companies, and it made a statement to the commission of its proportion of such gross receipts. It did not report the whole gross receipts of the company, because they did not belong to it. They belonged in part to another by reason of business done by it in this state in connection with another.

I have, therefore, concluded that the tax commission had not the right to report to the auditor the entire gross receipts coming into the hands of the defendant, but only that proportion of such receipts which were derived from business done by the defendant in connection with the Buckeye company under its contract for furnishing gas to the inhabitants of Coshocton.

The construction which I give to the statute as to the term "gross receipts" only applies to gross receipts which are the property of the defendant and not "gross receipts" which are the property of the defendant and another derived from business done in connection with such other in a common enterprise.

The construction contended for by the state would lead to the levying of a tax, where two persons are combined to carry out a common enterprise and divide the proceeds, upon the basis of the whole fund in the hands of the one who first receives it, and again upon the basis of a part of the same fund after it is divided. Such an injustice was not contemplated by the statute, and I will, therefore, overrule the demurrer to the answer. Exceptions.

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ORGANIZATION OF A COUNTY BUILDING COMMISSION.

Common Pleas Court of Hamilton County.

STATE OF OHIO, EX REL JAS. A. GREEN ET AL, v. ROBERT E. EDMONDSON, AUDITOR; AND STATE OF OHIO, EX REL JAS. A. GREEN ET AL v. M. P. SCULLY, H. H. LIPPELMANN AND STANLEY STRUBLE, COUNTY COMMISSIONERS.

Decided, May 17, 1912.

Commission for Building a New Court House—County Auditor Must Act as Recording Officer—Failure of Members to Attend—Mandamus to Compel Performance of Duty—Sections 2341, 2342 and 2409.

1. A distinct legislative intent appears in the provisions of Section 2342, P. & A. Anno. G. C., that the county auditor shall act as the recording officer of a commission to build a new court house, and a writ of mandamus will issue requiring him so to act, notwithstanding the earlier and in some measure conflicting provision for the appointment of a clerk of the board of county commissioners in place of the auditor.
2. In the absence of a different provision in the statute, a county building commission will be governed in the conduct of its business by ordinary methods and parliamentary rules, and a failure of the county commissioners to attend the meetings of the building commission or to vote will not subject them to mandamus, unless such refusal relates to participation in business requiring an affirmative vote of five members.

Dudley V. Stuphin, Albert Bettinger and Thos. B. Paxton, Sr., for relators.

Pogue, Campbell & Groom, Prosecuting Attorneys, contra.

HUNT, J.

The demurrers to the petitions in each of the above cases were heard together and will be so considered. Both are mandamus cases and involve the construction of the statutes providing for the appointment of a "building commission" to build court houses and other county buildings, the first case being against

the county auditor and the second against the members of the board of county commissioners.

The petition in the first case alleges that the relators, James A. Green, Thomas W. Allen, Braxton W. Campbell and George F. Dieterle, are citizens of Cincinnati and taxpayers of Hamilton county; that on February 21, 1912, they were duly appointed by the common pleas court as members of a "building commission," of which the three members of the board of county commissioners were *ex-officio* members, which commission was charged with the duty of building a court house and jail for Hamilton county, and that they have duly qualified as such; that on March 22, 1912, a meeting of said building commission was held at the office of the county commissioners; that the defendant, who was and is the duly elected and qualified auditor of the said county, was requested to act as clerk or secretary of said commission and keep a "full and accurate record of all proceedings of said commission," as provided by Section 2342, General Code; that on March 29, 1912, the defendant declined said request and refused and has ever since refused to so serve, claiming that it would not be legal for him so to do; that such refusal seriously interferes and prevents the carrying out of the objects for which the commission was created. A writ of mandamus is prayed for commanding the defendant to act as such clerk or secretary.

The petition in the second case sets up the character and the appointment of the relators, and that the defendants, M. P. Scully, H. H. Lippelmann and Stanley Struble are the duly elected and qualified commissioners of Hamilton county; that on March 22, 1912, the relators met with the defendants at the office of the county commissioners and attempted to proceed with the performance of their duties and particularly attempted to effect a temporary and permanent organization of said "building commission" by the election of a president or chairman or presiding officer and of a vice-president or vice-presiding officer; that said defendants and each of them refused to participate in any proceeding relating to a temporary or permanent organization of said commission and refused to vote for the election of

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a president or chairman, or presiding officer, or vice-president or vice-presiding officer for said commission; that on March 26, 1912, a subsequent meeting was held at which the relators and the defendants were present, and said defendants again refused to participate in said proceedings and have ever since refused so to do, claiming that one of their members, Stanley Struble, who was president of the board of county commissioners, was by virtue of his office president of said "building commission"; that such act of the defendants is unlawful and their said refusal seriously hinders and prevents the carrying out of the objects for which the commission was created. A writ of mandamus is prayed for commanding the defendants to participate in the proceedings relating to a temporary and permanent organization of said commission and compelling defendants to vote for a presiding officer and vice-presiding officer.

An alternative writ was issued in each case, and the defendants in each case have filed demurrers to the petition.

Before considering the legal question raised by the demurrers in these cases, it would not be irrelevant to consider some facts of common knowledge.

Prior to the general election in November, 1908, the commissioners of this county adopted a resolution declaring the necessity of a new jail building and of the levying of a tax for such purpose. The question of the levying of such tax was submitted to the people at such general election and a vote in favor of such levy was polled. The county commissioners, assuming that they were authorized to proceed, caused plans of such jail building to be in part prepared, but before proceeding further, they were advised that Section 2333, General Code, providing for the creation of a building commission was applicable. Thereupon a certificate of the result of such election was certified to the court of common pleas and such court on January 9, 1911, appointed William Griffith, George Schott, Michael Devanney and John E. Bruce to act in connection with the county commissioners as a "building commission" for the building of such jail. Such building commission entered upon their duties, and

the west half of the square bounded by Main, Sycamore, Canal and North Court streets, having been acquired by the county commissioners for such jail, plans and estimates of such jail were prepared; but the necessity of a new court house becoming manifest, and the Legislature of Ohio having at last passed an act permitting the much desired change of the canal to a boulevard, the jail commissioners by resolution recommended the building of a new court house with a jail as part thereof and the acquiring of the east half of said square bounded by Main, Sycamore, Canal and North Court streets for use in connection with the west half already acquired, and the present court house lot, for such building. Having called for and having obtained an expression of opinion by the bar association, the civic organizations and various citizens of the county in regard thereto, said jail commission asked the county commissioners to take the action necessary to build such new court house and jail building combined, and decided to postpone any further action on their part in the building of a separate jail building until the county commissioners could act. The county commissioners in pursuance of such action of the jail commission declared the necessity of a new court house building with a jail as part thereof and ordered the question of the issue of bonds for such purpose in the sum of \$2,500,000 to be submitted to the people at the general election in November, 1911. The vote was in favor of the issue of such bonds and, in due time thereafter, the court of common pleas in accordance with Section 2333, General Code, appointed James A. Green, George F. Dieterle, Thomas W. Allen and Braxton W. Campbell to act with the county commissioners as a building commission for the building of such court house with a jail as part thereof. Various civic organizations of the city requested that electors be appointed as members of the commission who would agree to serve without compensation. The court secured such persons and made the appointment in connection with a declaration of such persons to so serve. The latter commission is commonly known as the court house commission. The jail commission has taken no further action, and in doing the various things which in effect precluded them from

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proceeding with the building of the jail, they were manifestly animated by an unselfish regard for the public good, because by their action the appointed members of such commission precluded themselves, in a large part at least, from that compensation to which they would have been entitled under the law if they had proceeded with the building of the jail.

During all this time Mr. Stanley Struble was one of the county commissioners, and is now president thereof, and *ex-officio* a member of both the jail and the court house commissions. To his efforts to a large extent, in connection with the public spirited conduct of the jail commissioners and other citizens, must be attributed the fact that a new county building containing a new court house and jail is now possible and probable in the near future.

There is no question but that the general authority to acquire land for, and the erection and repair of court houses, jails, etc., is lodged in the county commissioners under Section 2419, General Code, subject to certain conditions as to the vote of the people; where the building is to cost more than fifteen thousand dollars, Section 5638, General Code; or where the repair thereof costs more than ten thousand, Section 5645; and certain restrictions as to the approval of plans, Section 2348, General Code; and methods of contracting, Sections 2353, 2354, 2364, General Code; and that upon compliance with the statutory conditions they have the right to issue bonds for such purpose, Section 2434, General Code.

Subsequent to the passage of the acts of which Sections 2419-2348 were a part, Section 2333 together with Sections 2334 to 2344, General Code, in their original form as the act of April 18, 1904 (97 v. 111), was passed. Not by way of amendment or supplement to any prior act, but as a separate and distinct act with a separate and distinct title, to-wit: "an act to provide for a commission for building court houses." It is not claimed that the amendment of March 4, 1906 (98 v. 53), affects the question now under consideration. As to the changes made by the code, it is a general rule that changes in arrangement or

phraseology made in a general codification or revision of the statutes, do not change the legislative intent as expressed in the original acts, unless such change is clear and certain. The work of the codifying commission was adopted by the Legislature and enacted as a general code, but the duty and powers of the codifying commission were prescribed by the act of April 2, 1906 (98 v. 221), although they did not report for several years. They seem to have exceeded their instructions in the insertion of the final clause of Section 2338, General Code, making the chapter relating to the erection of public buildings applicable to such commission after the Supreme Court in the case of *Mackenzie v. State*, 76 O. S., 369, had rendered a decision to the contrary. That, however, does not affect the application of the general rule to the present case. The building commission act in Section 1 provides that:

“When the county commissioners of any county have determined under and by authority of the statutes of the state of Ohio to erect a court house which shall cost to exceed twenty-five thousand dollars and after the question of issuing the bonds of such county for the construction of said court house or other county building, has been submitted to a vote of the electors of the county, and said question has been determined by said electors in the affirmative, said county commissioners shall within thirty days after said election has been held and the results thereof determined, apply to the judge of the court of common pleas for said county, who shall appoint four suitable and competent freehold electors of said county, not more than two of whom shall be of the same political party, who shall in connection with the county commissioners, constitute a building commission and who shall serve until the completion of said court house, as contemplated herein.”

The conditions precedent to the operation of said act according to its terms were two: first, when a court house was to be erected which would cost more than twenty-five thousand dollars; second, when the question of the issuing of bonds for the construction of the court house or other county building has been approved by the vote of the electors.

If the building is not to cost more than twenty-five thousand dollars, or if bonds are not to be issued for such purpose, but

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the money therefor is to be raised without the issue of bonds, apparently such act does not apply and such seems to have been the view originally taken by the county commissioners in regard to the jail building.

The two conditions, however, existing, to-wit, a cost of more than twenty-five thousand dollars, and to be paid for by the issue of bonds, the act requires the creating of a "building commission" for the building of a court house or other county building, and defines the powers of such commission—prescribes their duties and operates as an exception to the general statutory provisions applicable otherwise to such particular subject-matter.

The Supreme Court in *Mackenzie v. State*, 76 O. S., 364, decided that the method of building a court house by a building commission created under the act was independent of the general provision of the statutes applicable to the building of a court house by the county commissioners alone, whatever may be the effect of the subsequent insertion of the last clause of Section 2338 by the codifying commission. This independence is not in any mere method by the county commissioners but in the agency of the people (same case p. 374). The independence of said building commission is not affected by the requirement of the General Code, that they are to be governed by the provision of the chapter relating to the erection of public buildings. On the contrary, such clause is a recognition and acceptance of their independence, as established by the case of *Mackenzie v. State*, *supra*, because if for the purpose of building a court house the building commission were merely a changed form of the body known as the county commissioners, or the appointed members were simply auxiliary to the county commissioners as claimed, such provision of the General Code would have been entirely unnecessary, the county commissioners without such provision being governed by the provisions relating to the erection of public buildings—Section 2362, General Code.

The building commission by Sections 2338, 2340 and 2341, General Code, is given the power to approve and adopt plans, drawings, estimates, etc. If the building commission is appointed to build a court house or jail, Section 2348 becomes in-

applicable as being in conflict with special statutory provisions pertaining to such approval. If a commission is appointed to build an infirmary, Section 2349 becomes inapplicable. Similarly as to children's homes, Section 2351, and as to any other county building, the approval of the plans of which are otherwise provided for by prior or general statutes. The only sections of the act which have been cited as requiring the building commission to do something which might inferentially be considered as being an act of the board of county commissioners, considering such board as simply enlarged for the purpose of constituting it a building commission, are Sections 2341 and 2342, which require that the votes upon certain resolutions shall be "by yeas and nays, recorded on the journal of the county commissioners," and that "full and accurate records of all proceedings of the commission shall be kept by the county auditor upon the journal of the county commissioners."

If the building commission was simply the board of county commissioners enlarged by the inclusion therein of the appointed members as auxiliaries or otherwise when the appointed members were meeting with the county commissioners, these provisions would be unnecessary, because already provided for by Section 2406, General Code. There is no legal or physical impossibility or difficulty in the journal of the county commissioners being used as the journal of the building commission. In fact, there is some reason for so doing, because the building commission being a temporary body, if a certification of their minutes be required before or after said commission ceases to exist, Section 2407, General Code, which provides that, "it shall be duly certified by the president and clerk and shall be received as evidence in every court in the state," if applicable to the building commission, would provide statutory evidence of the proceedings of the commission. The "it" is the record of the proceedings of the county commissioners provided for by Sections 2406 and 2407, and any incongruity in the president and clerk of the county commissioners certifying to the record of the proceedings of the building commission is more of an argument in favor of the inapplicability of Sections 2407, 2409 and the other

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sections pertaining to the organization of the county commissioners, than in favor of the mere designation of a continuous county record as the place for the record of the proceedings of the building commission, eliminating the independent existence of the building commission otherwise clearly contemplated by the statutes specifically applicable to their duties and method of doing business.

The record of the proceedings of the county commissioners by Section 2407 when the board is not in session is by said section required to be kept in the office of the auditor. Section 2409 provides for the appointment by the county commissioners of a clerk in place of the auditor, who by Section 2566, is otherwise their secretary, but makes no change in the provision as to where this record of the proceedings of the board of county commissioners shall be kept. So that constructively, at least, such record when the board is not in session is kept in the auditor's office. There is therefore, no impracticability in such record book being used by the auditor in recording the proceedings of the building commission, especially as the members of the county commissioners, being members of the building commission, are not to be in session when the building commission is in session. In view of the recognized practice in courts and other legal bodies of dividing up their journals into different parts so that work may be done upon all such parts at the same time, it is admitted that no inconvenience will arise by reason of a part of the journal being used by the county commissioners and part by the building commission.

Sections 2341 and 2342, General Code, originally part of the building commission act, and Section 2409, a part of the chapter pertaining to the county commissioners, are as follows:

Section 2341. "Resolutions for the adoption or alteration of plans or specifications, or award of contracts, hiring of architects, superintendent or other employes and the fixing of their compensation, the approval of bonds, and the allowance of estimates shall be in writing and require for their adoption the votes of five members of the commission, taken by yeas and nays recorded on the journal of the county commissioners. When

signed by five members of the commission the county auditor shall draw his warrant on the county treasurer for the payment of all bills and estimates of such commission." (97 v. 113, Section 4.)

Section 2342. "Full and accurate records of all proceedings of the commission shall be kept by the county auditor upon the journal of the county commissioners. He shall carefully preserve in his office all plans, drawings, representations, bills of material, specifications of work and estimates of costs in detail and in the aggregate pertaining to the building." (97 v. 113, Section 5.)

Section 2409. "If such board finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board." (R. S., Section 845.)

The commissioners of Hamilton county have availed themselves of Section 2409 and have appointed a clerk to take the place of the auditor as their secretary, and it is argued that by reason thereof said clerk should perform the duties specifically enjoined upon the auditor under Sections 2341 and 2342. In addition to the fact that the building commission act is a later act and charges such duties upon the auditor specifically and not upon the secretary or clerk of the board of county commissioners, and the further fact that Section 2409 is by its terms and context applicable only to the duties of the auditor in connection with the proceedings of the county commissioners, Section 2409 also contemplates that such duties of the clerk shall be such as to require him "to devote his entire time" to such duties, leaving no time for him to act for the building commission. The Legislature therefore provided that the auditor should act as recording officer of the building commission. For these additional duties he can adequately provide by the appointment, if necessary, of a deputy under Section 2563.

The recording officer of the building commission is therefore the county auditor, or a deputy appointed by him for such purpose.

The building commission and the board of county commissioners, whatever names may be applied to the two bodies or entities, by reason of the difference in their constituent members, all of equal authority, are different bodies, or boards or entities, and as such in so far as not otherwise specifically provided by statute, should and have therefore the right to conduct their business in the ordinary way in which a separate body consisting of seven members charged with a great public duty and entrusted with the expenditure of several millions of public money and empowered to determine questions of permanent and great importance to the community, would and should conduct their proceedings, so that a full, accurate and orderly record could be kept by the auditor of their proceedings. No method has been suggested or can be suggested for accomplishing these results, except the ordinary parliamentary methods which involve a presiding officer and recording officer.

The statute designates a recording officer, to-wit, the auditor. The general statutes provide for an accounting officer and a disbursing officer, but make no provision for a presiding officer. The building commission must therefore, in some proper way, designate such presiding officer.

If the acts of the building commission were merely ministerial in character, the concurrence of a mere majority, except where the statutes otherwise provide, would be the action of the commission without such concurrence being at a meeting of the members as the commission. But as the duties of the commission involve the exercise of judgment and discretion, a meeting of the commission at which all members shall be actually or constructively present, is necessary in order that there may be full consultation and discussion, after which each member might exercise his best judgment before action. This makes a meeting necessary. A. & E. Ency., Vol. 23, page 368; *McCortie v. Bates*, 29 O. S., 419-422; *State, ex rel, v. Wilkesville Tp.*, 20 O. S., 288-293; *Merchant v. North et al*, 10 O. S., 252-258.

An orderly meeting so conducted that the auditor can properly perform his duty to record the proceedings is equally necessary.

Such being the powers of the building commission and the duties of the auditor as its recording officer, should a writ of mandamus be issued in the cases at issue?

The duty of the auditor being clear and absolutely necessary to the commission in the performance of its public duties, a writ should issue in the first case requiring him to attend in person or by deputy and record the proceedings of the commission.

The building commission has not attempted to perform any of its duties except pertaining to its necessary organization. The commission consists of seven members, each member having equal power and authority. The commission itself is charged with certain duties involving the exercise of judgment and discretion by each of its members. The statute does not specifically provide for its necessary organization. The general rule applicable to boards, commissions and similar bodies or entities of a definite membership therefore applies, unless the statute otherwise specifically provides, to-wit, that a quorum consists of a majority of its members, and that such quorum, due notice having been given of the time and place of meeting to all members, can exercise the powers of the commission; and further, that a majority of such quorum is the action of the body or commission.

If the meeting is held at the proper time and place and after statutory notice has been given, or if the statute does not provide for the notice, then after reasonable notice, and if members refuse to attend, unless their absence makes a quorum impossible, or if they attend or refuse to vote, such refusal to attend or to vote does not preclude the vote of the majority of those voting upon the motion or resolution from being the action of the commission, even though such majority is less than a majority of the members of the entire commission. *Meacham on Public Officers*, Section 572; *Merchant v. North et al*, 10 O. S., 252-258; *State, ex rel, v. Wilkesville*, 20 O. S., 288-293; *State, ex rel, v. Schinnock*, 37 O. S., 227.

Under such rules, all the members of the commission having been present and there being no claim that the county commissioners refused to attend any necessary meeting, the relators consisting of a majority of the commission, have themselves full

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power to organize the building commission, even though the county commissioners refuse to vote upon such organization. The reason of their refusal if persisted in, is and would be immaterial.

The four relators, therefore, unless they divide equally, which is not alleged, are not precluded from electing a president or presiding officer, nor from taking any other action not otherwise provided for by statute and necessary to a proper organization. If the county commissioners refuse to vote upon any resolution requiring the affirmative vote of five members, or if after due notice, such county commissioners refuse to attend any meeting at which such resolution is to be voted upon, then a writ of mandamus would properly issue compelling them to attend, and by their vote exercise the discretion vested in them by law, in accordance with general principles and rules laid down in the following cases: *Atty-Gen. v. Lawrence*, 11 Mass., 90; *Commonwealth v. Ayers*, 5 Pa. Dist. Rep., 575; *State v. County Comrs.*, 22 Fla., 29; *Wampler v. State*, 148 Ind., 557.

However, it is not alleged, and certainly will not be presumed that the county commissioners will not perform their full duty in attending the meetings of the commission, or in the conscientious exercise of the duty to vote or act upon any matter upon which the statute requires the affirmative vote of five members of the commission.

The refusal of the county commissioners to vote upon questions of mere organization, upon the facts alleged in the petition, does not therefore interfere with the performance by the building commission of its statutory duties, and the relators neither as tax-payers nor as members of the commission have the right to require the county commissioners to do that which is unnecessary, nor that which if not done would not be prejudicial. *State v. Buckham*, 4 C. C., 246.

The writ of mandamus prayed for in the second case will therefore be refused.

MANDAMUS TO COMPEL PERFORMANCE OF OFFICIAL DUTY.

Common Pleas Court of Lorain County.

THE STATE OF OHIO, ON THE RELATION OF THE LORAIN DEMOCRAT
COMPANY, v. E. C. BRANSON, COUNTY TREASURER OF
THE COUNTY OF LORAIN.

Decided, 1911.

Office and Officer—Mandamus to Compel County Treasurer to Publish the Tax Rate—Must be Brought by Official Whose Duty it is to Enforce Official Action—Publisher of Newspaper, Without a Contract to Make Such Publication, Without Rights in the Matter—Section 6253, General Code.

Mandamus to compel public officials to perform duties required by law can be instituted only by a public officer whose duty it is to enforce the performance of official duty by other officers and by other relators having a direct beneficial interest, or where the public injury will be serious if the duty be not performed, or the proper public officer refuses to bring such proceedings; and hence a mandatory order to compel publication by the county treasurer of the rates of taxation, does not lie upon application of a publisher having no contract to publish the same, notwithstanding relator may own the only newspaper printed in the German language in the county able to qualify under General Code, 2648, 6253.

G. A. Resek, for relator.

F. M. Stevens, contra.

DOYLE, J.

The relator seeks a writ of mandamus to compel the treasurer of Lorain county to publish the tax rate of 1910 in the *Lorain Post*, a newspaper printed in said county in the German language and owned by the relator.

The defendant demurs to the petition because it does not state facts sufficient to constitute a cause of action, and also because relator has no right to prosecute this action, and further com-

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plains that Section 6253, General Code, on which relator partly predicates its action, is unconstitutional.

It is only necessary in disposing of this case to consider the second objection. The cases cited by relator were examined, and that examination disclosed that *State, ex rel, v. Commissioners*, 56 O. S., 631, was an action brought by the proprietor of a newspaper, a tax-payer, and eligible to publish the document in question when filed, to compel commissioners to file their annual statement, or report, with the court. Writ was allowed, but no issue was made on the right of relator to bring the action. This, however, was not an action to compel the commissioners to publish with the relator.

State v. Brown, 38 O. S., 344, was an action to compel the sheriff to give notice and make proclamation of an election of a judge. Action was brought on relation of an elector of the county. The case was decided on another point, but the court remarked that the relator as a citizen was interested in having judges to administer the law, as an elector was entitled to vote for a judge and was eligible himself to the office, and these constituted his beneficial interest. In this case as well as in *State, ex rel, v. Tauszey*, 49 O. S., 656, it may have been said that to refuse the writ would have been a serious public injury, so in *State v. Nash*, 66 O. S., 612, the Attorney-General refusing to bring the action, a private citizen was allowed to maintain it for the public good.

In the case of *State v. Commissioners*, 22 C. C., 57, the relator was certainly beneficially interested, because the right to the fees claimed had already accrued and a duty devolved upon the commissioners to issue the proper warrant.

In the present case the relator has no right to publish the commissioners' report until the proper contract has been made. It has no interest in this matter except as a tax-payer, and as such can not bring this action to compel the officials in question to do their duty. Such an action must be brought by a public official whose duty it is to enforce official duty on other officials.

To allow any tax-payer to bring proceedings in mandamus against an official whom he judges is not following his legal

duty, would open a fruitful field for annoyance of public officials and unwise and unnecessary multiplicity of suits. The more orderly way is to leave the instituting of these extraordinary proceedings to the officers clothed by law with the authority to determine when the writ of mandamus should be invoked and to institute the proper proceedings to secure its aid in enforcing official duty.

A case similar to this case was passed upon in *State v. Commissioners*, 4 N. P., 180, and the relator held not entitled to maintain the proceedings. That was an action to compel commissioners to publish (under Section 917, Revised Statutes) their annual report. The court in passing upon the issue said:

“The purpose of the law being to give information to the public, each member of the public is alike interested in it and the duty to furnish the information; and, hence, the duty of the commissioners to cause the report to be printed, is purely a public duty. The interest of publishers of newspapers is purely incidental.”

The judgment of the common pleas court in the above case was affirmed by the Circuit Court of Preble County at its May term, 1896.

The fact that the relator may own the only German paper able to qualify for the publication under Sections 2648 and 6253 of the General Code, is a mere accident and would not add to relator's rights.

This fact is, however, not set forth in the petition and for that reason would defeat relator's right to predicate anything upon it in the action, but even though it were set forth in the petition, the relator would have no right to invoke this extraordinary remedy.

The demurrer to the petition is sustained.

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McMillan v. McMillan et al.

PROVISION BY TESTATOR FOR UNBORN CHILDREN.

Common Pleas Court of Greene County.

M. C. McMILLAN v. S. J. McMILLAN ET AL.*

Decided, 1912.

Wills—Provisions for After-Born Children—Where Residuary or Conditional—Construction of Section 10561—Words and Phrases.

Where a testator had no children at the time of executing his will and has made clear his intention that his will shall apply to unborn children, it is not for the court to inquire whether such provision was large or small, equal or unequal, vested or contingent, present or future. *Rhodes v. Weldy*, 46 Ohio State, 224, not followed.

W. L. Miller, for plaintiff.*Marcus Shoup*, contra.**KYLE, J.**

The plaintiff brings this action to have his title to 109 acres of land quieted as against the defendants and in his petition avers that he is the only son of Hugh McMillan, who died in February, 1894, leaving the defendant, S. J. McMillan, his wife, and the defendant John McMillan, one of the beneficiaries named in his will.

The will of Hugh McMillan is set out in full, and the plaintiff claims by the terms of said will he is entitled to have his title to said lands quieted as against each of said defendants.

The defendant, S. J. McMillan, demurs to the petition, and the determination of the questions raised upon the demurrer involve the construction of the will of Hugh McMillan.

The part of the will determinative of the rights of the parties is the following:

“At the death of my said wife in case she should have no children or child by me living, then and in that case if said

* Affirmed by the Circuit Court without opinion, April 23, 1912.

farm was not sold by my said wife they shall each inherit said farm equally, share and share alike, and in case that my said wife shall not have any children living and she be the owner of said farm and homestead." * * *

It is apparent that the word "no" in the clause above given should be disregarded in order to give the will any meaning and carry out the intent of the testator and the will will be considered as if such word "no" were omitted.

The question presented, which was argued very fully, is whether or not the provision made by the testator for his children born after the execution of his will, which is residuary or conditional, is such provision contemplated under Section 10561? In this case the testator having no children at the time of the execution of his will, the construction of this will depends upon the effect given of the law laid down in *Rhodes v. Weldy*, 46 O. S., page 234, where the Supreme Court construed Section 5959, Revised Statutes, now General Code, 10561. In that case the testator devised his real estate to his wife for life "and after her death to the heirs of her body begotten," and the court held that a child born to him after the execution of the will is not "provided for in the will in the sense of Section 5969."

On page 237 the court says:

"It will not be contended that this is a specific provision for the plaintiff. If it is a provision at all it is so because the language is comprehensive enough to include her. It was evidently written with a view only to the maternity 'of the heirs of her body begotten' and without reference to their paternity. * * *

* The question is: Has Elizabeth 'been provided for in the will' in the sense of the statute? It is not conclusive of this question to say that a 'disposition' has been made which may inure to her benefit. 'Disposition' and 'provision' are not necessarily convertible terms."

In the 63d Maine, page 156, it was held that "a child of the testator born after his death can not in any proper sense of the term be deemed 'provided for in his will' by a general devise of reversion to the heirs of the testator."

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In the 68th Pennsylvania State, *Willard's Estate*, it was held that where the testator gave to his wife his property during her life and at her death was to revert to the testator's children and heirs, was not a provision for the after-born children within the meaning of the statute, which provided that unless such after-born children were provided for the will would be deemed revoked as to them.

In all these cases and others where the after-born child was incidentally included in a class such interest is not such a contemplation by the testator of any unborn child as to come within the meaning of the statutes "unless said child is provided for." There must be in the mind of the testator a specific designation of his purposes and desire with respect to such unborn child as to show that their consideration was clearly in his mind with respect to his property, and on that ground the case of *Rhodes v. Weldy* could have rested without any other reason, but in that case Judge Owen in his opinion goes on further and states that a reversionary or contingent interest for an unborn child is not a provision within the meaning of Section 5969, that such interest must be a present vested interest.

In support of this the court says. "The case of *Willard's Estate*, 68 Pennsylvania State, is, we think, directly in point." In that case the court held:

"That a reversionary interest, whether vested or contingent, is not a provision for an after-born child within the words or spirit of the statute."

To the same effect the prior cases of *Hollingsworth Appeal*, 51 Pennsylvania State, 518; *Lamplugh v. Lamplugh*, 1st Peer Williams, 111, which were also quoted by Judge Owen in the 46th Ohio State.

All these cases in Pennsylvania are overruled in the 209 Pennsylvania State, *Newland's Estate*, page 456, where the court holds:

"Syllabus. The act of April 8, 1833, Section 15, P. L., 249, relating to the revocation of a will by the subsequent birth of a child makes no requirement that the child shall be fully or ade-

quately provided for; that is left to the discretion of the parent as in the case of living children. All that it does require is that he shall have the child in mind and shall make clear his intention that the will shall apply to it. Any provision which does this is sufficient and the inquiry whether large or small, equal or unequal, vested or contingent, present or future, is irrelevant and outside the jurisdiction of the courts except so far as it tends to throw light on the question of intention."

In the opinion the court criticises the 68th Pennsylvania State, p. 463:

"It is true that Judge Sharwood fortifies his position by an argument that if the child take as heir with the other children that he takes only a reversion, which in *Edwards Appeal* Judge Woodward had gone out of his way to say would not be a present provision within the statute. But that this argument is only a make weight appears clearly from what is said by Judge Sharwood in the same opinion."

To the same effect is the case of *Randall v. Dunlap, Appellant*, 218 Pennsylvania State, page 210. The case of *Bowen v. Hoxey*, 137 Massachusetts, is also relied upon by Judge Owen in the 46th Ohio State. In that case the share which would come to the after-born child came to her only as one of a class, the provision for her was unintentional and the most that could be said that the provision for the class happened to be broad enough to include her. That would support the first ground upon which the 46th Ohio State is based.

In *William Minot, Executor*, 164 Massachusetts, page 38, the court held that a reversionary interest after the death of the wife to his heirs at law by blood was a provision for an unborn child and distinguishes it from *Bowen v. Hoxey*, and held that a reversionary interest was sufficient to fulfill the requirements of the statute and overruled the case of *Bowen v. Hoxey* to that extent, if it was quoted in the 46th Ohio State for that purpose.

The 10th Georgia, page 79 is also quoted by Judge Owen. The Georgia statute required that there must be a positive provision made for an unborn child. In the 115 Georgia, page 857, it was held that a bequest to the wife "and that she shall take

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every care of our children and do what is just and right by each of them" is not a provision made in contemplation of such event "of after-born children."

It appears to me that every case referred to upon which Judge Owen may have based his reasoning that a reversionary or conditional interest is not such provision as is contemplated by the statute for an unborn child has been overruled.

In *Osborn v. Bank*, 116 Illinois, where the statute provides that an after-born child for whom no provision has been made by will, will take by law that any bequest no matter how insignificant it may be or upon what contingency, however remote, is sufficient to comply with the statute within the meaning of a provision made by will.

So also in the *Donges Estate*, 103 Wisconsin, 497, where most of the cases referred to in the 46th Ohio State and including the 46th Ohio State were reviewed, the court held that a reversionary interest constitutes a provision for an unborn child within the meaning of their statute.

The case of *Insurance Company v. Luskey*, 66 O. S., 233, has been cited by the plaintiff. In that case the testator had a child living, after disposing of his property further provided:

"Should any child or children, we now having only one, George Garfield, be born to me thereafter it shall in nowise alter or revoke this will and testament."

The court held that that provision did not preclude the unborn child from taking under Section 5961. That section provides what interest an unborn child may have as against the will of a testator who had a child or children living at the time he made his will. Section 5959, Revised Statutes, applies to a case where the testator has no children at the time of the execution of his will, and there are afterwards children born. These sections are independent of each other, and the 66 O. S. does not attempt to give any construction to Section 5959.

When this case was before the circuit court reported in the 20 O. C., 198, the court in referring to the 46 O. S., after quoting the 68 Ohio State, 327, and the 51 Ohio State, 518, and the 63 Maine, 156, said:

"These cases are cited with approval in the case of *Rhodes v. Weldy*, 46 O. S., 234, where the construction of Section 5959, Revised Statutes, was involved, and seem to require that the provision for an after-born child should be not only substantial but for his direct and immediate benefit."

Section 5959, Revised Statutes, provided:

"If the testator had no children at the time of executing his will, but shall afterward have a child living, or born alive after his death, such will shall be deemed revoked unless provisions shall have been made for such child by some settlement, or unless such child shall have been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut presumption of revocation shall be received."

The codifiers in the General Code changed the language so that Section 10561 provides:

"If the testator had no children at the time of executing his will, but afterward has a child living or born alive after his death, such will shall be revoked unless provision has been made for such child by some settlement, or he is provided for in a will, or in such way mentioned therein as to show an intention not to make such provision. No other evidence to rebut the presumption of revocation shall be received."

The phrase "or he is provided for in the will" is almost exactly like the Pennsylvania Statute which is "or have a child or children not provided for in such will."

In the 46th Ohio State on page 242 the court construed the clause "provisions by some settlement" to mean at least a substantial present means of maintaining the child, and they say:

"When we have ascertained what a provision for a child of tender years by some settlement is we shall have made good progress in the solution of the question at bar. It would not be a sound proposition to say that the same word occurring in different places in the same statute always means the same thing. It may sometimes call for a radically different construction, but where the same word or phrase is used more than once in the same act, especially in the same section and in the same sentence

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in relation to the same subject-matter, and looking to the same general purpose it is a fundamental rule of statutory construction that if in one connection the meaning is clear and the other it is otherwise doubtful or obscure it is in the latter case to be construed the same as in the former."

On page 234 the court further says:

"The general subject treated in these two expressions is the same, to-wit. a provision for an after-born child which shall save a will from the revocation which must otherwise result from the birth of such child after the execution of the will giving to the word 'provision' in the one phrase substantially the same construction which the word 'provisions' is clearly entitled to in the other, and the conclusion is that Elizabeth was not 'provided for in the will by the devise of the testator's land to his wife to use and occupy as to her may seem proper during her natural life, and after her death to the heirs of her body begotten.'"

That conclusion is decisive of the case at bar, unless the change made by the codifiers permits a different construction, or unless this court should not agree with the reasoning of the court in that particular. The change in the statute is in the two phrases from "or unless such child have been provided for in the will" to "or he is provided for in the will."

The Supreme Court seem to have based their construction upon the above phrase upon their construction of the previous one in respect to a settlement, holding that a settlement must be immediate, therefore the provision in the will must be immediate.

I am free to say without the *stare decisis* I would have had no difficulty in concluding that by the terms of this section the provision for a settlement might be construed to be immediate provision, while the provisions in the will might be immediate, contingent or reversionary, or the such after-born child might be debarred by a proper declaration of intention. If you hold that the provision in the will must be a present one to carry out the same line of reasoning the court should pass on its adequacy. If a testator of large estate should will each of his after-born children one dollar and no more as a present bequest, how could the claim be made that there was any provision for such chil-

dren? The reasoning in the 68th Pennsylvania, and quoted with approval in the 46th Ohio State, that such after-born children in case of a statutory bequest might be left dependent upon their mother is rather a weak argument to my mind. If any testator could not leave his after-born children of tender years in the care of their mother, then to whose care could he commit them? From my experience and observation they would not be likely to suffer nearly as much were the mother to have a free hand to use the estate for their maintenance as they might be if it were tied up in the hands of some trustee and possibly a large part of the income used to maintain the trust. I do not think that the statute contemplates any such view as taken by the Supreme Court in the 46th Ohio State. I think the interpretation that the bequest of a residuary or contingent interest is not a provision for an unborn child clearly designated within the meaning of the statute is not justified by the language of the code, and the authorities quoted above. Every authority relied upon in this 46th Ohio State upon this phase of the case having been overruled, and the reasoning of the court not commending itself to this court—although this court may be reversed—it seems to me that the full meaning of that section can only be given when you leave the character of the provision for unborn children under Section 10561 to be left wholly to the intention and declaration of the testator; and, therefore, in my judgment when a testator has made clear his intention that his will shall apply to unborn children, it is not for the court to inquire whether such provision was large or small, equal or unequal, vested or contingent, present or future, and the demurrer in this case will be sustained.

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Patterson v. Patterson.

CHRISTIAN SCIENCE AND DIVORCE.

Court of Insolvency of Hamilton County.

KATE PATTERSON V. ALEX. PATTERSON.

Decided, April, 1912.

Divorce—Wife Embraces Christian Science—Zeal for that Faith on Her Part and Indifference on the Part of Her Husband Result in a Separation—Decree Refused—Custody of Afflicted Child.

1. A decree of divorce will not be granted on the ground of gross neglect of duty to a devotee of the Christian Science faith, where it appears that the strained relations existing between herself and husband are due to her adoption of this faith and his indifference thereto and resulting incompatibility between two persons of strong mentality.
2. In such a case the custody of an afflicted son twenty years of age, who has been committed to an institution, will be accorded to the husband.

Michael G. Heintz, for plaintiff.

Thorndyke & Capelle, contra.

WARNER, J. (orally).

This is one of the most unfortunate cases that I have ever heard. The wife comes into court and asks for a divorce from the husband on the grounds of extreme cruelty and gross neglect of duty. She is evidently a woman of intelligence and respectability. The husband himself appears, and, not asking for any divorce himself, contends that he has done nothing that will justify his wife making an application for divorce. He also is a gentleman of good reputation and standing in this community. Here are two parties who have lived together for some twenty-five years, and who have had their ups and downs during the married life. While unfortunate in having an afflicted child, they lived together all these years. But they have now separated from each other and executed articles of separation which cover property interests and appear to be unable to live longer together as husband and wife.

The mere fact that they are not able to live together as husband and wife is no cause for a divorce to either.

The mere fact of incompatibility of temper, unless its existence and results amount to extreme cruelty, is not a cause for divorce.

In her testimony the wife states that the husband has not been a companion to her during all their married life. Just exactly the meaning of this upon the evidence might seem doubtful.

But I think I can understand the situation when I take into consideration all the evidence that was adduced in this case. I have no doubt but that the relationship of these parties up to the time that this disagreement occurred were of the ordinary harmony that exist between husband and wife. So the court is brought to face this one question: as to whether the treatment of this wife by the husband in the matter of her religious belief has been such treatment as in law amounts either to gross neglect of duty or extreme cruelty.

It is apparent, I think, that under certain circumstances there might be treatment on the part of the husband toward the wife with reference to religious beliefs that would amount to extreme cruelty. It is extremely unfortunate for these parties that any such controversy with reference to religious belief should have arisen. But the question arises in that regard, what is the duty of each to the other under such circumstances? Under the marriage contract each owes to the other proper consideration under circumstances that arise during that relationship. It is not a one-sided affair. It is equally incumbent upon the wife to respect the husband as it is for the husband to respect the wife in matters of opinion. Probably there is no belief that stirs men's feelings so deeply as religious belief. So men and women have been burned at the stake because they would not recant their religious belief. They have been willing to forfeit life rather than their religious convictions. This clearly shows the strength of religious belief. Now this wife is a woman of strong character. She is a woman of strong convictions, and undoubtedly believes with her whole heart and soul that the Christian Science religion is absolutely right in all respects, and she undoubtedly has the utmost confidence in it. But, even having this sincere

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belief, it is her duty to respect the belief, whatever it may be, of the husband. The husband on the other hand seems to be a man without any settled religious belief, which is his right. He also is a man of strong mentality, and of determined character. It is most unfortunate that a difference of this kind should have arisen between these two people with such strong personal characteristics—with this religious question as a bone of contention between them as husband and wife.

Now I am clearly of the opinion that under such circumstances these parties should have refrained mutually from any discussion of these matters upon which they were so far apart in their opinions. I think it was the duty of the husband to refrain from all criticism of the belief of his wife, and it was clearly the duty of the wife to refrain from giving her husband any just cause to complain of her conduct in the management of the household or otherwise. Now under these circumstances a third element has crept in—the unfortunate boy.

Undoubtedly they both desire his best welfare. There can be no question of that. Undoubtedly the wife would do everything in her power for the boy's good as she understands it. And undoubtedly the father would do the same. But they disagree entirely as to what is best for the boy. The father, like a good father, yielded to the mother's importunities and allowed this boy to be treated under the method of Christian Science for a period of time, and then finding no good results seemed to come from the treatment, he very naturally objected to the further continuance of that treatment. The mother on the other hand desired to continue this treatment. The boy, however, was finally sent to the hospital at Gallipolis, Ohio, for epileptics. How and under what circumstances does not appear from the evidence. But he is there. Undoubtedly the treatment of this boy was a bone of contention between them, and I do not see how that contention could have been avoided. And so I have no doubt but that there was discord, and, possibly, at times harsh words and probably severe criticisms by the father of the Christian Science Church. I place no particular stress upon the evidence that was gone into as to the visits of this wife to these different places at-

tending meetings of her church, visiting friends and the small amounts of money she expended.

The further fact that she, herself, treats people under the methods of Christian Science has little or no bearing on the merits of this case. In a nut shell, the question is whether or not having these convictions which I have described, this father has been guilty of extreme cruelty or gross neglect of duty by his treatment of his wife during the latter part of their association together. I have no idea that there has been any personal violence. And so I come to the question of whether or not the evidence and the situation of the parties is such, that I can justly and fairly hold this husband has been guilty as suggested. I have no doubt about the strained relations of the husband and wife, but strained relations are not a cause for divorce. I am also confronted with the situation that in all probability these parties will never live together again, and that if this marriage relation continues it is merely a form of law and not a union of hearts. But this is not a cause for divorce. I have no doubt but that the attitude of this defendant towards his wife was, under this circumstance of religious difference, exceedingly disagreeable to her, but on the other hand her attitude with reference to her religious belief was also exceedingly disagreeable to him. It is a most unfortunate situation, but as I construe the statutes of Ohio I can not see my way clear to grant this plaintiff a divorce although I would be glad to do so if a legal ground could be shown. As far as the custody of the child is concerned, the court under our statutes, the parties being separated, has the power to determine which party should be given control. Under the peculiar circumstances of this case, the boy being at this time twenty years of age and now at the Gallipolis Hospital, I shall give the custody of the boy to the father.

A decree may be drawn accordingly.

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Meade v. Hawkins et al.

SUNG BY INITIAL LETTER.

Common Pleas Court of Hamilton County.

STEPHEN J. D. MEADE V. MARY HAWKINS ET AL.

Decided, May 6, 1912.

Names of Defendants—Failure to Sue by Full Christian Name—Defeats Lien on Transcript of Judgment, When—Title in Bona Fide Purchaser Without Knowledge—Subrogation.

The filing in the common pleas of the transcript of a magistrate's judgment does not create a lien upon the real estate of the debtor as against title of a subsequent *bona fide* vendee, where the debtor was sued by initial letter and the action was not one which fell within the statutory exception for the naming of a party defendant by initial letter or a contraction of his name and the purchaser was without actual knowledge of the filing of such lien or judgment.

Millard Tyree, for plaintiff.

M. W. Conway, contra.

HUNT, J.

The plaintiff obtained a judgment before a justice of the peace against M. Hawkins. Pursuant to Section 11659, General Code, a transcript of such judgment was filed in the office of the clerk of the court of common pleas for lien and entered upon the execution docket as a judgment against M. Hawkins, but no execution was issued. At the time of such filing Mary Hawkins was the owner of the real estate described in the petition. Thereafter, without actual notice of such filing, lien or judgment, for a valuable consideration the defendants, Ida Gordon and Fannie Rothenberg, became the purchasers of such property and duly filed their deed with the recorder of Hamilton county. Thereafter, on the 25th day of October, 1911, the plaintiff filed this action against Mary Hawkins, Ida Gordon and Fannie Rothenberg et al. for the sale of said property under his alleged lien.

The primary question is whether or not the plaintiff by the filing of his transcript obtained a lien upon the real estate of Mary Hawkins, enforceable as against the title of a subsequent *bona fide* vendee. There is no claim that M. Hawkins, who owed the debt upon which the judgment was given, was not Mary Hawkins the owner of the real estate. There is no claim that Mary Hawkins was ever known as M. Hawkins, or that she ever used the initial "M" as her first name, or used the initial in any way.

The question, therefore, is not a question of identity, nor is it a question of the validity of the judgment nor of the right to enforce it against any property owned by M. Hawkins, nor against the property of Mary Hawkins, if commonly or otherwise known as M. Hawkins. This case is therefore distinguishable from the following cases: *Citizens Nat. Bank v. Union Central Life Ins. Co.*, 12 C.C.(N.S.), 401; *Daniels v. Taylor*, 13 C.C.(N.S.), 116-117; *Kinsey Co. v. Heimerdinger*, 13 C.C.(N.S.), 195; *Mack v. Schlottman*, 7 A. L. R., 665.

The question in this case is whether or not the filing in the office of the clerk of the court of common pleas of the transcript of the judgment of the justice of the peace against M. Hawkins creates a lien upon the property of Mary Hawkins superior to the title of a subsequent *bona fide* purchaser of such property. To so operate, the transcript must be such as is required by law, and must be such that the clerk from an inspection thereof can do that which he is required to do by law.

A judgment presumes an action. An action presumes parties. There is only one statutory provision permitting the designation of parties by initial letter, Section 11259, providing that parties so designated in a written instrument in an action thereon may be so designated. It does not appear that plaintiff's original action was within such exception. It is true that in the absence of an allegation to the contrary where parties are designated by initial, such initial is presumed to be their full name, but the record in this case shows that no such presumption is applicable.

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Sections 11659 and 11718, General Code, provide that the clerk shall enter upon the execution docket the "*names in full* of parties to the cause," etc. How can the clerk do this, if the transcript filed does not give the full names of the parties. The full name of the plaintiff may be a matter of indifference, but not that of the defendant whose property is sought to be affected by such entry.

It seems, therefore, that the plaintiff in this case has so far failed to comply with the statute that the equity of a *bona fide* purchaser of the property should be superior to the statutory lien, if any, of the plaintiff.

This case is decided upon mere technical grounds with little reluctance, for the reason that upon the allegations of the answer, or at least upon an allegation of those facts which might ordinarily be inferred from the allegations made in the pleadings, there is a question of subrogation which has not been argued by counsel, but which if decided in favor of the defendant upon the authority of *Straman v. Rechtine et al*, 48 O. S., 443, and cases cited therein, would preclude the plaintiff from any real benefit by reason of his judgment and from enforcing any sale except at his own costs.

The answer sets up the fact that at the time the plaintiff filed his transcript there were two mortgage liens upon the property—one in favor of the Liberal Building Association for \$3,000, and another in favor of Quibbeman, Mesch & Hollahan for \$1,000; that the property at that time was worth less than said mortgage liens thereon; that on March 9, 1909, after the filing of plaintiff's transcript, Mary Hawkins, being in default in the payment of said mortgage liens, conveyed said property (whether by warranty or not is not alleged) to Quibbeman, Mesch & Hollahan for no other consideration than the assumption by them of said liens; that on February 2, 1911, Quibbeman, Mesch & Hollahan conveyed said premises to the defendants, Gordon and Rothenberg; that the mortgage to the Liberal Building Association was paid by the defendants, Gordon and Rothenberg, and a new mortgage executed by them to the Provi-

dent Building Association for \$1,800; that the defendants have substantially improved said property, but from the time of the conveyance to Hawkins up to the time of the conveyance to the defendants it was never worth more than \$2,500.

Without foreclosing counsel of the plaintiff upon argument from establishing the law to be to the contrary, it seems that the defendants, Ida Gordon and Fannie Rothenberg, should properly be subrogated to the liens of the Liberal Building Association and of Quibbeman, Mesch & Hollahan existing unpaid at the time of the filing of plaintiff's transcript, in so far as they were paid by the subsequent owners of the property, or merged in their titles.

The demurrer of the plaintiff to the second, third, fourth and fifth paragraphs of the answer and cross-petition of Ida Gordon and Fannie Rothenberg is therefore overruled.

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Peters v. Firestone.

**TRUST DEED CONVEYING PARTNERSHIP PROPERTY
TO BE APPLIED TO LIQUIDATION OF
PARTNERSHIP DEBTS.**

Common Pleas Court of Franklin County.

C. L. PETERS, ADMINISTRATOR, v. C. D. FIRESTONE.

Decided, November 17, 1911.

Partnership—Deed Conveying Property of—Held to Create an Express Trust—Where the Purpose Was to Liquidate Partnership Liabilities—Administrator of Deceased Partner Brings an Action for an Accounting—Estoppel—Laches.

1. A deed by which two partners constituting a firm "remitse, relinquish, release and quit-claim" all partnership property to one partner to enable him to settle, compromise and pay partnership debts, both partners acknowledging that each shall remain liable for his proportionate part of existing firm debts, counsel fees and court costs in defending actions against them as partners, conveys absolutely the legal title for the purposes designated, but does not constitute a bargain and sale of all interest, legal and equitable, of one partner to the other. Upon its face it is a trust deed creating an express trust in any residue of partnership property, after paying firm debts, in which both partners participate.
2. Probate courts being courts of plenary and exclusive jurisdiction in the matter of appointing administrators, their records can not be collaterally impeached; hence, in an action by an administrator of a deceased partner for an accounting of partnership property by the surviving partner, the right of plaintiff to maintain the action can not be raised.
3. An order of probate directing assignee for creditors to turn over property of insolvent partnership to partner to whom the firm has conveyed its property to enable him to extinguish firm debts, is not a finding of absolute conveyance to such grantee and does not estop the representative of another partner from maintaining an action for an accounting against such grantee.
4. Laches in bringing suit for an accounting by an administrator of a deceased partner against a surviving partner, to work an estoppel, can not be predicated upon mere lapse of time. The burden is on the partner asserting the defense to show knowledge in the administration of a residuum of partnership property after settling the firm's affairs.

E. P. Evans and Pugh & Pugh, for plaintiff.

F. A. Davis and Stewart & Stewart, contra.

BIGGER, J.

By a stipulation of the parties to this suit, the question submitted to the court for decision is limited to a determination of whether, under a certain deed dated December 16, 1896, and executed and delivered by George M. Peters and Clinton D. Firestone, the property therein described belonging to George M. Peters and Clinton D. Firestone, partners doing business as the Columbus Buggy Company and Peters Dash Company, was thereby remised, released, relinquished and quit-claimed to the said Firestone, in trust for the benefit of said partnership, to be used by him to settle and compromise with the creditors of said partnership and pay off the debts thereof, and whether, if any surplus of said property should remain after the settlement, compromise and payment of said debts, the said Firestone should account to said partnership for the same; and that the issue between the parties whether the property of said partnership so remised, relinquished, released and quit-claimed to said Firestone was or was not sufficient to settle with the creditors thereof and pay their claims, shall not be heard and determined at this hearing.

By the same stipulation or agreement, certain other matters are agreed upon and to be considered by the court in so far as they may be found competent, relevant, admissible and material. These, which are somewhat lengthy, I will not stop to recite.

It is plaintiff's contention, first, that the deed itself by its very terms makes Firestone a trustee, and, second, that by virtue of the fiduciary relation existing between George M. Peters and C. D. Firestone, equity makes him a trustee. This is denied by the defendant, who claims that the deed conveyed all of the interest of George M. Peters in the partnership assets, both legal and equitable, to C. D. Firestone, and that this plainly appears from the terms of the deed itself.

Some oral evidence was heard in addition to the written stipulation under the well-known rule of construction, which admits

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evidence of this character on a question of construction of written instruments, so as to place the court as nearly as possible in the position of the parties at the time of the execution of the instrument, and to enable the court to construe it in the light reflected upon it by the circumstances and conditions surrounding the parties at the time the instrument was executed.

From the stipulation and the oral evidence, it appears that George M. Peters and C. D. Firestone, as partners doing business as the Columbus Buggy Company and the Peters Dash Company, had made an assignment of all the partnership property for the benefit of their creditors in August preceding the execution of this deed, which deed was executed and delivered on December 16, 1896; that in July, 1897, an order was made by the probate court terminating the assignment and ordering the assignees to reconvey the property assigned to C. D. Firestone, and that C. D. Firestone immediately thereafter took possession of the property; that Firestone effected a settlement and compromise with all the partnership creditors and paid their claims under the terms of the compromise. It further appears that, in making the settlement, Firestone made use of the moneys transferred to him by the assignees, and also made use of the other property conveyed to him for the same purpose, and that there was no account by Firestone to Peters, who died in January, 1897, nor since, to his estate.

This deed in the first clause recites the fact that the partners had made an assignment of the partnership assets to the assignees, naming them, for the benefit of their creditors, and that the assignment was then pending in the Probate Court of Franklin County. In the next clause, it recites that it is desirable that a proposition to compromise and settle the debts and obligations of the partnership should be made by one or both of the partners. In the next clause, it is stated that for the purpose of enabling Clinton D. Firestone to make an offer of compromise, liquidation, and settlement to the creditors of said partnership, the said George M. Peters is ready and willing to relinquish all his right, title, estate and interest in said partnership property and assets, and in the business of said partnership.

including the good will thereof, and all the estate, right, title and interest reserved to him in said deed of assignment. Then follows the granting clause which provides that George M. Peters, in consideration of one dollar to him paid by Firestone, the receipt whereof is acknowledged, and in consideration of the covenants, agreements and conditions hereinafter contained and set forth to be kept and performed by Firestone, covenants and agrees to and does remise, release, relinquish and quit-claim to Firestone and his heirs and assigns forever, all the right, title, estate and interest of Peters in the partnership property, describing it.

Then follows the habendum clause in this language: To have and to hold unto the said Clinton D. Firestone, his heirs and assigns forever, each and every item, piece and parcel of the said above-named property, with all the privileges and appurtenances thereof or thereunto belonging, provided, nevertheless, and these presents are upon this express condition, that the said C. D. Firestone has agreed and does hereby agree to use his best efforts and to endeavor to obtain the assent and acceptance of the offer of compromise, settlement and liquidation so to be made by him by each and all of the creditors of the said partnership. Now, if the said Clinton D. Firestone shall not obtain the assent or acceptance of said offer of compromise and settlement by 87 per cent. of all the creditors of said partnership in amount, then this release, transfer, quit-claim and settlement shall be void, if the said George M. Peters, or his executors and administrators, so elect, otherwise to be and remain in full force and virtue in law forever.

This is followed by an agreement of the parties (and the deed is signed by both parties), to the effect that each of the parties shall remain liable to the other for his proportionate part of all debts existing against the partnership and of any judgment that may be rendered against them as partners, and for their proportionate part of the counsel fees and court costs incurred in defending against actions brought against them as partners, and that neither shall confess judgment against the partnership without the consent of the other, and each agrees to use all rea-

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sonable effort to notify the other of any suits that may be brought against them and to defend the same as far as there may be any legal defense against the same.

Then follows an agreement on the part of Firestone for himself and for the officers and employes of any new firm or company into whose possession the partnership books may pass, so far as his control and influence can require, that Peters and his executors and administrators shall have his and their earnest co-operation and assistance in any litigation against the said Peters or his estate growing out of the partnership, and that this shall include assistance in the production, inspection or explanation of the books and papers of the partnership.

The deed is signed by both parties and signed and acknowledged in the presence of witnesses. It appears from the evidence that at the time of the execution of this deed, Peters was very ill and feeble, and that he died in about one month thereafter. Very elaborate and able briefs have been submitted to the court by counsel, which have been read and re-read and careful consideration given to the respective contentions of counsel.

It would consume too much time to take up and discuss at great length and consider all of the contentions and decisions of courts and statements of rules of law by text-writers which have been cited on the subject of trusts and trust deeds, and I must content myself with a statement of the conclusion reached, and, briefly, the considerations which lead me to that conclusion.

In the first place, it seems to me clear that this deed effected an absolute conveyance of the legal title to all of the partnership property, in so far as the interest of Peters in that property was concerned, upon a condition. That condition was that Firestone should use his best efforts to obtain the assent and acceptance of the offer of compromise and settlement by each and all of the creditors of the partnership, and that upon compliance on the part of Firestone with this condition, and, further, that his efforts should result in obtaining the consent of 87 per cent. in amount of the creditors to the terms of the compromise and settlement, then the deed took effect as an abso-

lute conveyance of the legal title to Firestone. It is admitted that his efforts resulted in securing the assent of all the creditors to the terms of the compromise and that settlement was made with them by Firestone in accordance with the terms of the compromise. Firestone, therefore, having complied with the conditions prescribed in the deed as to securing the assent and acceptance of 87 per cent. in amount of the creditors, the deed became absolute, in that it conveyed to Firestone the legal title to all of the partnership assets, and authorized and empowered him to make use of the partnership assets in carrying out the terms of the settlement.

But this does not determine that the conveyance to Firestone was a bargain and sale to Firestone of all of the interest of Peters in the partnership assets, both legal and equitable. This deed recites the purposes for which the property was conveyed. It is stated that:

“For the purpose of enabling Clinton D. Firestone to make an offer of compromise, liquidation and settlement to the creditors of such partnership, the said George M. Peters is ready and willing to relinquish all his right, title, estate and interest in said partnership property and assets, and in the business of said partnership, including the good will thereof, and all the estate, right, title and interest reserved to him in said deed of assignment.”

Here we have a plain and unambiguous statement of the purpose of Peters in making the conveyance. He recites that he is willing to make the conveyance for the purpose stated. This, of course, repels the idea that he was willing to make it for any other purpose. It is suggested by counsel for the defendant in argument that the conveyance was made by Peters for the purpose of protecting his private estate, and that the terms of the deed show that to the extent of 87 per cent. of the partnership indebtedness his private estate was protected. But this conclusion is not borne out by the language of the deed. In fact, the agreement did not obligate Firestone to pay 87 per cent. of the partnership indebtedness, or any other percentage of that indebtedness, unless the assets of the partnership were sufficient for that purpose. By the terms of this agreement,

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Firestone only undertook to use his best efforts² to secure from all of the partnership creditors, an acceptance of the offer of compromise, and did not obligate him to pay the debts or any part of them. On the contrary, the deed itself plainly repels by its language that construction, for it expressly provides that both Peters and Firestone shall remain each liable to the other for his proportionate share of the partnership debts. Had this been the intention of the parties, the deed would have recited that to the extent of 13 per cent. of the partnership indebtedness, each should remain liable to the other for his proportionate share thereof. The agreement recites that it is desirable that such a compromise should be effected. This was desired, therefore, as much by Firestone as by Peters. If this was desirable, then it was the duty of Firestone to endeavor to effect it, and his efforts to do so could not, it seems to me, constitute a consideration for the conveyance of this property to him by his partner, who was at the time sick and unable to take part in these negotiations.

Nor will the deed bear the construction claimed for it by defendant's counsel, that Firestone was endeavoring to pay out of his own private means the cost and expense of making the compromise. Assuming that he should have incurred cost and expense, in doing so he was and will be entitled to reimburse himself out of the partnership assets for it. If this had been the intention of the parties, we would reasonably expect to find an agreement on the part of Firestone to pay some definite proportion of the partnership indebtedness, and thus exonerate Peters to that extent, which, had that been the agreement, would have required of Firestone that he bear the expense of effecting such a compromise, provided, at least, the partnership assets would not pay that proportion of the indebtedness, and also the costs and expenses of effecting the compromise. But, under the terms of the contract, Firestone was as much entitled to pay the costs and expense incident to effecting the compromise and settlement out of the partnership assets as to pay the debts themselves out of it.

Under the terms of the stipulation, the court can not make any finding as to the value of the property of this partnership,

and no evidence^{*} was offered on that subject. If the value of the partnership assets was in excess of that needed to effect the compromise and settlement upon the terms proposed, the inquiry suggests itself, what consideration appears in this deed for the conveyance of that excess to Firestone. Under its terms, Firestone agrees to pay none of the debts of the partnership, except in so far as the partnership assets will suffice for such payment. What consideration of any value passed to Firestone as an inducement for him to convey this excess of the value of the partnership assets over the liabilities under the compromise settlement proposed? He was still to remain liable under its terms as before, for all partnership debts. Under its terms he was to be released from no financial obligation that rested upon him before its execution. If, on the other hand, the value of the partnership assets was only equal to or less than the sum necessary to effect the settlement, there would be no inducement to Firestone to make a purchase from Peters of his interest, and no reason is apparent why he should desire to make a purchase instead of simply taking the legal title to effect the settlement of their joint indebtedness. But, whatever might have been the purpose of Firestone, it is inconceivable to me, that if this had been intended by the parties as a conveyance of both the legal and equitable estate of Peters, the language employed in making this contract would have been used. The words "bargain and sell" are not used. It is only "remise, release, relinquish, and quit-claim." There is, as I have said, no consideration which should induce Peters to convey absolutely his property to his partner, if it was in excess of that necessary to effect the compromise and settlement, while he, still under the plain terms of the contract, remained liable, as before, for all the unpaid debts of the partnership. It is, of course, no answer to this consideration to say that this was a deed absolute upon the happening of the conditions stated. There is no question but that it was a deed absolute and that it absolutely conveyed to Firestone all the legal estate of Peters in this property and would be effective as between Peters and anyone to whom Firestone should sell the property to convey the entire estate to such pur-

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chaser. But as the only purpose of the conveyance to Firestone was to enable him to compromise and make a settlement with the creditors, for any residue remaining after he had made such payment, a trust resulted in favor of Peters or his estate. As to the character of the trust created, I am of opinion an express trust was created, because it specially provided the purpose for which it was conveyed. It was to be used by Firestone for the purpose stated, but if any residue remained, a trust resulted out of the very terms of the deed itself in favor of Peters or his estate as to the residue. After a careful consideration of the deed and the arguments of counsel, I am of the opinion this deed is upon its face a trust deed and this view is, it appears to me, strengthened when we consider the relationship of these parties to each other.

As to the right of the plaintiff to maintain this action, I am of the opinion this question can not be raised upon this hearing. The probate court being a court of plenary and exclusive jurisdiction in the matter of the appointment of administrators, its record imports absolute verity and can not be collaterally impeached, in the absence of an express showing from the record itself that it was without jurisdiction. This was expressly decided in *Shrover v. Richmond*, 16 Ohio St., 455, and has been repeatedly approved since.

As to the claim that the judgment of the probate court by which this property was ordered and directed by that court to be turned over to Firestone when the assignment was terminated estops the plaintiff here, I am clear it had no such effect. By the deed of Peters, he had conveyed all his right, title and interest in the property to Firestone for the express purpose of enabling Firestone to carry out the terms of the compromise and settlement, and that was the purpose of raising the assignment. It was for the very purpose of enabling Firestone to carry out the terms of the deed and contract between Peters and Firestone that the property was ordered by the probate court to be turned over to Firestone by the assignees, but this was in no sense a finding and judgment by that court that no trust relationship was created as between Peters and Firestone ✓

by the deed, and it had no jurisdiction to decide any such question. Nor can the court find upon the evidence now before it that the plaintiff is estopped to assert this equitable right upon the ground of her laches. Laches which is a species of estoppel is only available where the proof shows that the person to be estopped by the laches had knowledge of the equitable right which it is sought to assert. Laches is pleaded as a defense, and, of course, the defendant has the burden of proving it. To estop the plaintiff it would seem that there must be evidence to show that she knew that there was a residuum after paying the debts of the partnership, for otherwise there would be no liability to Peters or his estate on the part of Firestone. There is no evidence whatever before the court that she had any such knowledge for any specific period of time. Mere lapse of time alone is not sufficient according to all the authorities.

After giving to this case the most careful consideration, I am convinced this deed created a trust which was an express trust, to the extent that it provided the purpose or use which was to be made by Firestone of the property, and that out of this express trust and resulting from it is a trust in favor of the estate of Peters for one-half of the residuum, if any remained after effecting the settlement with the partnership creditors.

There is no language in this deed which indicates that it was a bargain and sale. Considering the relationship of the parties to the contract and the legal duties and obligations resting upon the partners by virtue of that relationship and the fact that the purpose for which the conveyance was made is plainly and unambiguously stated in the deed, excluding the idea that the conveyance was for any other purpose, the absence of any apparent reason on the part of Peters for such conveyance as the defendant claims, if the property conveyed was of greater value than the amount of the compromise settlement, and the equal absence of any reason on the part of Firestone to desire or insist upon any such conveyance, if the value was equal to or less than the amount of the compromise settlement, leads me to the irresistible conclusion that no such conveyance as defendant claims was in the contemplation of the parties

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at the time of the making of this deed and contract. This seems to me to be clear from the language of the deed itself and that conclusion is strengthened by the other consideration stated.

**A WIDOW'S RIGHT TO DISPOSE OF THE DEAD BODY
OF HER HUSBAND.**

Common Pleas Court of Hamilton County.

ELIZABETH EVANS V. ANNIE T. EVANS ET AL.

Decided, May 22, 1912.

Burial—Cremation—And Disposal of the Remains of the Dead—State of the Law with Reference Thereto—Widow Has Paramount Right to Elect as to the Disposition to be Made of the Remains of Her Husband—Injunction.

It is the duty of a widow as the heir or next of kin of her deceased husband to dispose of his body in a reasonable and sanitary manner, and where in conformity with his expressed desire she elects to cremate his body, injunction will not lie against that method of disposal, where based only on sentimental objections to cremation on the part of other near relatives.

DICKSON, J.

The plaintiff complained that the defendants were about "to cremate and consign to ashes the body of Frank B. Evans, recently deceased; that she and her family believe that the cremation of a body is contrary to religion and the will of God, and that unless restrained, the defendant will cause her to suffer irreparable injury; that cremation is not Christian burial and that she will suffer great distress of mind and anguish of spirit if the body of her brother were cremated and that she would lose her interest in her brother's body," and she asks for an injunction temporary, then final.

During the trial Nettie E. Bruce, a sister, testified:

"By Mr. Black—

"Q. State to the court, what is your name? A. Nettie E. Bruce, of Marion, Ohio.

"Q. What relation are you to Frank B. Evans? A. A sister.

"Q. What relatives did Mr. Evans leave? A. What relatives did he leave? He left a sister, Mrs. Frank Mulvy, Miss Lizzie Evans and myself, and a Mrs. Clark of New York.

"Q. What attitude have you toward disposing of the body by cremation? A. I am very much opposed to cremation, not exactly on religious grounds, but it is the way our family feels on the subject."

Then Mrs. Annie T. Evans, the widow, stated to the court:

"My husband is to be cremated. It was his wish years ago, and on account of the way his father's body was buried and the bones taken up, he had a horror of being buried in the ground and having his bones scattered afterwards. Two years ago he said he wanted to be cremated.

"By Mr. Robert A. Black—

"Q. After the body is cremated, what do you expect to do with it? A. I will take care of the ashes in my home, as he requested me to do.

"Q. It was not your purpose to dispose of them in any cemetery? A. No, I intend to take care of them in my home as long as I live.

"By the Court—

"Q. Mrs. Evans, you have heard what these sisters say? A. Yes, sir.

"Q. Have you any objection to having him buried in the ground at their joint request? A. Yes, sir. I am carrying out his wishes. He had a horror of being put in the ground on account of the way his father's bones were taken up.

"Q. You are not willing to join with the sisters? A. No; I am going to carry out his wishes.

"Q. What are your wishes in the matter? A. Why, I want to have him put into a retort and cremated. I think it is the only sanitary thing to do and he felt in that way about it."

"What, Mr. Black, would you suggest should best be done under all the circumstances?

"I think that this body should be disposed of in such a manner that his relatives—his brother and sisters—may come to his

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grave. As Your Honor has seen, they are people advanced in life, that there is not much left to them except the memory of their dead, and it seems to me that they ought to be given that privilege.

"What is your opinion as a lawyer, Mr. Black, as to what is just and right—not a sentimental opinion, but as a lawyer?

"I believe that the court should have this body interred. The question of cremation has only been passed upon once and that is in an English report. You are asking purely as to law. The question of the direction of the decedent has been passed upon just once, and there the decedent left instructions for his body to be cremated. It was a case decided by the Lord Chancellor of England in 1896.

"What did he decide?

"The body was taken by force and cremated and the person doing it, and who was instructed by his last will to do that, brought suit to recover the expenses, and the court refused to allow him the expenses. The only case in Ohio is the one of *Herold v. Herold*, 3 N.P.(N.S.), 405. In that case the decedent requested that his body be interred at a place a very great distance from where he died. It was objected to by the widow and supported by the rest of the family. The court refused to carry out the request.

"What was the reason given for that decision?

"Because it was unreasonable under all the circumstances. The question of expense entered into that case.

"What do you mean by unreasonable?

"I mean that a body is not property, and it has been repeatedly held not to be property. There is an interest that may be had in it arising out of family tie. The widow is not the sole person having that interest. She can not keep out the rest of the family from their rights.

"Can they exclude her?

"No, they can not. It is the purpose of this widow to reduce that body to ashes and keep those ashes in the house. Now that in itself is startling.

"Has the court anything to do with what is startling?

"Other courts have had, Your Honor.

"We have no right to interfere with any one's conscience or religion. The body must be disposed of. If no one interested in kinship will do it, the public must. The public would have a right under some circumstances to give it to a hospital for dissection. Now, whose duty is it to dispose of this body, Mr. Black?

"Your Honor can make the widow dispose of it.

"Then has not the widow the right to dispose of it?

"Yes.

"Would she not have a right to dispose of it according to her religious or sentimental feelings?

"She has not an absolute right.

"Has she not a right to dispose of that body as she pleases since it is her duty?

"Would Your Honor say that she had a right to give this body to a hospital?

"That question is not before the court. It is the duty of the widow to dispose of the body on sanitary grounds. Since the law provides it is the duty of the widow as heir or next of kin to dispose of the body, what right have I in this case to interfere? Would she not have a right to dispose of it as she pleases under the seventh section of the Bill of Rights—

"'No person shall be compelled to attend, erect or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given by law to any religious society; nor shall any interference with the rights of conscience be permitted.'

"How can I interfere with her right of conscience, unless that conscience should be of such kind and nature as to be against the law or public policy or the Constitution?

"'No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceful enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.'

"Mr. Black: I am claiming that it will outrage the sensibilities of these sisters to have this body cremated.

"The Court: That is why I asked the widow if it would be possible for her to join in some agreement with the sisters. I had hoped, this being a matter solely of conscience, that we could get these good people together on the conscience matter and put this body on a lot, and so have the controversy ended. But since I am a judge and must decide according to the law, and since this body belongs to the widow for disposition and since it is her wish that it shall be burned, how can I interfere?

"Your Honor in passing upon the disposition of this body is going farther than any court heretofore to give the body either

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to the wife or sisters. You are going to shock the sisters in allowing this body to be cremated.

"The Court: Suppose you follow that out, Mr. Black. I have to shock the conscience of either Miss Evans and her sisters, or Mrs. Evans, the widow—the conscience of some one is bound to be shocked.

"Mr. Black: I do not recall that she said that she did make this a matter of conscience. She was in favor of cremation because it was sanitary and she had protested against burial in the ground.

"The Court: And Mr. Evans had requested it beforehand, and she regards it from her standpoint as the proper disposition of dead people.

"Mr. Black: We not only asked for an injunction, but we ask for such further rights as we may be entitled to in law and equity. My clients have been absolutely excluded from paying tribute of affection to the remains of their brother. It was this widow's purpose to have quickly taken this body and consumed it to ashes and then kept the ashes about the house. I feel that the court—there is no question but that the court can, and I feel that the court ought to require that the interment of this body be so deep that the conditions that the widow complains of as to the future would not happen. It ought to be on the conscience of this court to require the interment of this body, but make the condition that it would be interred in such a way that no occasion of having the bones exposed, as Mrs. Evans testified to on the stand, would arise. How can this court in any decency or justice allow this widow to cremate this body and keep the ashes around the house like a piece of bric-a-brac. I think that would be carrying the proposition down to the point of ridicule.

"The Court: How can I interfere with the morality or the right of conscience of any one so long as the law is not broken? The widow is required to dispose of the body, therefore she has some ownership in it—a duty to perform. She may dispose of it in any way she sees fit, so long as she does not violate the law. Suppose the wife desired interment in the ground and the sister desired cremation, what would you say should be done in that case?

"Mr. Black: I would say that Your Honor could not order cremation. It is unusual—because cremation is extraordinary—it is a freak.

"The Court: Why do you call it unusual, Mr. Black? In other days it was the only method of disposing of the dead.

"Mr. Black: There was a case—a famous case—a leading case in America, upon what are property rights, *In Re Ruggles*, 4 Bradford Surrogate, New York, 503, and I fail to find a case reported where a question of the dead arose, in which that case was not cited as a leading authority as the development of the attitude of the law on that subject. I want to read from that case:

"The right to the repose of the grave necessarily implies the right to its exclusive possession. The doctrine of the legal right to open a grave in a cemetery after a certain lapse of time, to receive another tenant, however it may be sanctioned by custom in the English church yards or by Continental usage at Pere-La-Chaise, and elsewhere, will hardly become acceptable to the American mind; still less the Italian practice of hastening the decomposition of the dead by corrosive elements.

"The right to the individuality of a grave, if it exists at all, evidently must continue so long as the remains of the occupant can be identified—and the means of identifying can only be secured and preserved by separate burial. The due and decent preservation of human remains by separate burial, is pre-eminently due to Christian civilization, which bringing in the coffin and the sarcophagus, superceded the custom of burning, and "gave" in Lord Stowell's vivid phrase, "final extinction to the sepulchral fires."

"That was written by a man who was esteemed as considerable of a scholar in America.

"The Court: I will have to hold, Mr. Black, that the body primarily belongs to the government. No body can be disposed of by any one without a permit from the proper authority. After the public is through with the body, where does it go? It goes, as far as right is concerned, to the person whose duty it is to dispose of it. The widow here is the heir of the decedent. To prevent the authorities from taking it, the widow must dispose of it. If she see fit to take that method of burial which suits her and does not enter into conflict with the laws of Ohio, she has a right to exercise her wish according to her own conscience—her own religious or moral beliefs. It is unfortunate that these sisters' feelings and consciences will be shocked by disposing of the body by cremation, but since it is not illegal and the law does not prevent it, this court can not interfere.

"The court will order that an opportunity be given before incineration for the next of kin to see the body."

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**PREVENTION OF CRUELTY TO LIVE STOCK IN
TRANSIT.**

Common Pleas Court of Cuyahoga County.

**THE MEEKS, BOREN & MILLER COMPANY v. THE CLEVELAND
HUMANE SOCIETY.**

Decided, May 29, 1912.

*Cruelty to Animals—Society for Prevention of—Provisions of the Ohio
Code Not in Conflict with the Federal Act—Discretion of Humane
Society Officers—Sections 10062 et seq.*

1. The Ohio statutes for prevention of cruelty to animals in respects other than those covered by the Federal twenty-eight hour live stock shipment law, are constitutional and enforceable, as applied to interstate shipments of live stock.
2. The discretion of officers and agents of a humane society in determining that the reloading of crippled live stock in transit, which has been unloaded for rest, feed and water, and the loading of such live stock in cars containing the carcasses of dead animals, constitutes cruelty, will not be interfered with by a court of equity upon the complaint of live stock commission men, in the absence of any showing that such discretion was abused.

*Stearns, Chamberlain & Royan, for plaintiff.
Kline, Tolles & Morley, contra.***LAWRENCE, J.**

The plaintiff in this case is a corporation engaged in the live stock commission business at Buffalo, N. Y., and during the past year, in the course of its business, many car loads of cattle, sheep and hogs have been shipped to it at Buffalo from Ohio and states west of Ohio, by way of Cleveland. In accordance with the provisions of the so-called federal twenty-eight hour law, which requires that interstate shipments of live stock be unloaded for feed and rest every twenty-eight hours, unless such time, under special circumstances, be extended, many of the car load lots of such live stock were unloaded at Cleveland for that purpose.

The defendant, the Cleveland Humane Society, is a corporation organized under the laws of Ohio, the object of which, among other things, is the enforcement of laws for the prevention of cruelty to animals. By statute such societies are authorized to appoint agents for the purpose of prosecuting any person found guilty of an act of cruelty to animals; and such agents, when their appointment has been approved by the mayor of the city or village for which they are made, are authorized to arrest any person found guilty of violating any provisions of the law protecting animals or preventing cruelty thereto. It is also provided by statute that an officer, agent or member of such a society may interfere to prevent the perpetration of any act of cruelty to animals in his presence and use such force as is necessary to prevent it, and to that end may summon to his aid any bystanders. It is further provided that the word "cruelty" includes every act, omission or neglect whereby unnecessary or unjustified pain or suffering is caused, permitted or allowed to continue, when there is a reasonable remedy or relief. Other sections of the statutes impose penalties upon any person found guilty of cruelty to an animal.

As the only evidence respecting the acts of the defendant in the matters complained of by the plaintiff is the admission contained in the defendant's answer, I will read that in this connection, instead of repeating the charges in the petition. The defendant says, "that under some arrangement between the railroad companies transporting interstate shipments of live stock and the Cleveland Stockyards Company, the terms of which are unknown to the defendant, said stockyards company, in behalf of said carriers, attends to the unloading, feeding, resting, and reloading for shipment on to destination of certain shipments passing through Cuyahoga county; that in the exercise of the authority conferred upon it by law, and for the purpose of preventing unnecessary and unjustifiable pain or suffering on the part of said animals, or allowing the same to continue, the defendant has, at various times when such unnecessary and unjustifiable pain and suffering on the part of said animals was being caused or permitted in the presence of its officers and

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agents, and upon receipt of information from officers and employes of said stockyards company and from inspectors of the United States Government, charged with the duty of enforcing compliance with said 'federal twenty-eight hour law,' so-called that there were dead and injured animals among the live stock so being transported, and that animals so physically defective as to render them unfit to be carried to destination were included in the shipments, has refused to permit live stock removed from cars for feed and rest at the yards of said stockyards company in said county of Cuyahoga and state of Ohio, to be reloaded into cars in which there were dead animals, until such carcasses had been removed, and has further required the removal, and refused to permit the reloading of injured and crippled animals, and animals whose physical condition was such that their reloading and transportation would subject them to unnecessary or unjustifiable pain or suffering."

The plaintiff contends that the acts of the defendant in the premises are unreasonable and unnecessary; that the shipments of live stock thus interfered with are interstate shipments; that such acts constitute an unauthorized and illegal interference with interstate commerce, and are in violation of the Constitution of the United States relating to interstate commerce, and of the acts of Congress passed pursuant to the authority to regulate commerce among the states vested in Congress by the Federal Constitution; and that Congress has passed laws completely and fully controlling the humane and sanitary treatment of interstate shipments of animals, which apply to interstate shipments of animals unloaded in Cleveland, in compliance with said so-called twenty-eight hour law.

On the ground that the acts complained of constitute an unreasonable and unlawful interference with and damage to the business of the plaintiff, which are continuous in character and for which it has no adequate remedy at law, the plaintiff prays for an injunction against the defendant, its officers and agents, from further doing the acts complained of.

Coming now to the question of the validity of the acts of the defendant as affecting interstate shipments of live stock, I will

briefly indicate my views as to some of the preliminary questions which have been discussed by counsel.

I think there is sufficient evidence tending to show that the plaintiff has an interest in the subject-matter of this action, and that its business has to some extent been injuriously affected by the acts complained of, so that the plaintiff is entitled to maintain this action if it is otherwise entitled to relief. I do not give any weight, however, in this connection, to any acts by the stockyards company, except so far as it followed the directions of the defendant's agents not to reload crippled and dead animals into the cars. This company is the agent of the railway company, which is to be deemed the agent of the plaintiffs; and if the former did not dispose of such animals to the best advantage, the defendant would not be responsible for that.

So far as concerns the crippled animals removed from cars at Cleveland, it clearly appears that the reloading of such animals into the cars with other animals would be cruelty as defined in our statutes; and that the acts of the defendant in preventing the same are within the authority conferred upon it by the statutes. In respect to the dead animals which the defendant has required to be removed from cars before live animals were reloaded therein, it appears that, under some circumstances liable to occur, the presence of the carcasses of the dead animals may be a cause of injury to live animals; and also the offensive condition of the dead animals and the foul odor therefrom may sometimes cause sickness in live animals confined in the same car. There is no evidence as to the facts in this respect as affecting any of the particular cars or animals involved here. However, the humane society is one of the instrumentalities of the state for the enforcement of the laws to prevent cruelty to animals, and I think it must be held that its officers and agents are vested with discretion in the exercise of the powers conferred upon them by law; and when they act upon the ground that the presence of dead animals in the same car with live animals is cruelty to the latter, the court, in the absence of any evidence to the contrary as to any particular case, ought not to interfere with their discretion. I shall assume, therefore, that the

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things prevented by the defendant would constitute cruelty to animals in violation of the provisions of our statute on that subject, if such statutes are applicable to interstate shipments of live stock.

This brings me to what I regard as the important question in the case, which is, whether the enforcement of these statutes, as shown here, violates the clause of the Federal Constitution providing that the Congress shall have power to regulate commerce with foreign nations and among the several states.

It is not practicable to review the many decisions of the Supreme Court of the United States relative to this clause of the Constitution. In general, it may be stated that the rule to be deduced from the cases is that, where a state statute is of a general nature relating to a subject which admits and requires uniformity of regulation, and if it operates as a direct restriction or interference with interstate commerce, such state statute is invalid, even though Congress has not legislated upon the particular subject; but in the absence of congressional action, state legislation is not forbidden touching matters either local in their nature or operative merely as aids to commerce, and which affect interstate commerce only incidentally. *Mobile v. Kimball*, 102 U. S., 691; *Brown v. Houston*, 114 U. S., 622; *Railway v. Solan*, 169 U. S., 133; *Hennington v. Georgia*, 163 U. S., 299; *Railway v. Ohio*, 173 U. S., 285.

In *Railway v. Hefley*, 158 U. S., 98, speaking of a statute of Texas which was held invalid because covered by the act of Congress known as the Interstate Commerce Law, the court said that clearly the state and the national acts relate to the same subject-matter and prescribe different rules, and that in such case the state law must give way, for, though laws of such character rest upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter.

In *Morgan v. Louisiana*, 118 U. S., 455, holding valid the system of quarantine laws established by the statutes of Louisiana, the court say, in the syllabus, that while some of the rules of that system may amount to regulation of commerce with foreign

nations or among the states, though not so designed, they belong to that class which the states may establish until Congress acts in the matter by covering the same ground or forbidding state laws. And in the opinion (on page 464) it is said:

"But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a national board of health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent."

The case of *Railroad v. Haber*, 169 U. S., 613, involved a statute of the state of Kansas, which related to the bringing into the state of cattle liable to communicate disease to domestic cattle of the state. It was contended that the act of Congress of May 29, 1884, known as the animal industry act, together with the act of March 3, 1891, appropriating money to carry out the provisions of that act, and Section 5258 of the Revised Statutes of the United States relating to the transportation of passengers, freight, property, etc., from one state to another by railroad, cover substantially the whole subject of the transportation from one state to another of live stock liable to impart or capable of communicating infectious or contagious diseases, and therefore that the state of Kansas had no authority to deal in any form with that subject. After citing and reviewing many previous decisions, the court held against this contention, and in the opinion (on page 627) it is said:

"Although the power of Congress to regulate commerce among the states, and the power of the states to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and state governments or produce any conflict between the two governments in the exercise of their respective powers need occur unless the national government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the state legislation may refer."

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On page 623 of the opinion, speaking of the Federal Animal Industry Act, the court say :

“While the states were invited to co-operate with the general government in the execution and enforcement of the act, whatever power they had to protect their domestic cattle against such diseases was left untouched.”

There is, however, nothing in the opinion to indicate that the holding of the court was based upon the fact of such invitation, or that the decision would otherwise have been different. I speak of this, because counsel for the plaintiff here has contended that such was the ground of the decision, quoting a remark to that effect by Justice Brewer, in his dissenting opinion in *Railway v. Ohio*, 173 U. S., 285 (on page 325). But although the case of *Railway v. Haber*, 169 U. S., 613, is cited in the opinion of the majority of the court in *Railway v. Ohio*, no such construction is given to it, and the remark of Justice Brewer seems to be wholly without foundation except as the expression of his own individual view.

The act of Congress for the establishment of the bureau of animal industry authorizes the Secretary of Agriculture to prepare such rules and regulations as he may deem necessary for the suppression and extirpation of contagious, infectious and communicable diseases in animals, and to provide against the spread of the same from one state to another, but no provision is made in said act for the prevention of cruelty to animals. The inspectors in this bureau make inspections of cattle passing through Cleveland, with reference to contagious diseases and sanitary conditions, and dead animals also are inspected if the existence of such diseases is suspected, and, if the same be found, action is taken by the inspector in accordance with the rules and regulations prescribed; otherwise no action is taken in reference to dead animals. The instruction to the inspectors is, that if they see evidence of inhumane treatment of animals, they are to call the matter to the attention of those in charge, and, if the latter pay no attention, to report it to the department at Washington. The testimony is, that the only action taken by the department in such cases is to refer the matter to the local

humane society or other body looking after such things. Thus it appears that neither by the terms of this statute, nor by any rules or regulations adopted thereunder, has the bureau of animal industry any authority respecting the humane treatment of animals. .] 1 2

The contention of the plaintiff that the state law concerning cruelty to animals is unconstitutional, as applied to interstate commerce, must rest, therefore, on the provisions of the act of June 29, 1906 (34 U. S. Statutes at Large, 607), which provides that no carrier transporting live stock in interstate commerce shall confine the same in cars, boats or vessels of any description for a period longer than 28 consecutive hours, without unloading the same in a humane manner, into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours. This is undoubtedly a statute relating to the prevention of cruelty to animals, but it is limited in its application to the specific things provided for, and does not undertake to prevent all cruelty to animals in the course of transportation. It would be impossible for the federal officers, under its provisions, to prevent the transportation of crippled or dead animals with other animals. The state law, which embraces any cruelty to animals, affects interstate commerce only incidentally, is not inconsistent with the federal statute, and must rather be regarded as an aid to the policy of the latter. The federal statute does not cover the same ground, but only a part thereof. The subject is one which does not require uniformity of regulation as to all details, but the general policy in view can be carried out in some respects better by local regulation than by federal regulation. In the matter of the unloading of cars every twenty-eight hours for rest and feed, and the doing of this in a humane manner, the federal statute covers the ground and the state statute would probably not be operative; but, in my opinion, state regulation to prevent cruelty to animals in other respects is not prohibited, because Congress has not legislated as to that particular subject.

My conclusion is, that the plaintiff is not entitled to any relief, and its petition will be dismissed.

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Cincinnati v. Waite.

EXPENDITURES FOR ELIMINATION OF GRADE CROSSINGS.

Common Pleas Court of Hamilton County.

**THE CITY OF CINCINNATI V. HENRY M. WAITE, CITY ENGINEER,
ET AL.**

Decided, April 20, 1912.

*Municipal Corporations—Auditor's Certificate Not Required Under the
Burns Law, When—Expenditures for Grade Crossings.*

The provision of Section 3806, P. & A. Anno. G. C., making it necessary before any contract, agreement or other obligation involving an expenditure of money is entered into by a municipality that the auditor certify the money required to meet the proposed expenditure is in the municipal treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, is primarily applicable to expenditures derived from the general revenue producing powers of the municipality; and such a certificate is not necessary where a specific power is conferred upon a municipality for a specific purpose with a specific provision for payment of the expenditure involved in the exercise of such power.

*Alfred Bettman, City Solicitor, for plaintiff.
Maxwell & Ramsey, contra.*

HUNT, J.

Under the act of May 2, 1902 (95 v. 356), now in amended form Sections 8871-8892, General Code, counsel for the city of Cincinnati commenced proceedings for the abolishment of the crossing at grade of the Pittsburgh, Cincinnati & St. Louis Railway Company over Eastern avenue, known as Rookwood Crossing, and in such proceedings by Ordinance No. 836, passed April 17, 1905, agreed with the railway company as to the plans, etc., of such improvement, and as to the payment by the city and the railroad company of the cost there.

For various reasons the work has been delayed, but the railway company still claims the right to proceed under such ordinance. In pursuance of such ordinance, the railway company has made certain expenditures for which in pursuance of said

ordinance it has presented a claim to the city, which it is alleged the city, through its proper officers, is about to approve and pay.

The city solicitor in the petition herein asks that the city be enjoined from making such payments, upon the ground that the ordinance is void, because the auditor did not make the certificate provided for by Section 2702, Revised Statutes (3806, General Code), that the necessary funds were in the treasury applicable to such purpose, further alleging that there were no such funds in the treasury at the time of the passage of the ordinance, although since that time such funds have been provided by a bond issue.

The defendant, the Pittsburgh, Cincinnati & St. Louis Railway Company, answers admitting the want of the certificate of the auditor, but sets up all that it has done under such ordinance, the cause of delay, and the further fact that in an action brought by the city solicitor in the Superior Court of Cincinnati, the validity of the ordinance was attacked upon other grounds than want of such auditor's certificate, in which action this defendant answered, and the court upon the final hearing of said case dismissed plaintiff's petition.

The petition and answer herein are lengthy, but the real issues raised by plaintiff's demurrer to defendant's answer as argued to the court, are, first, whether the certificate of the auditor as to the existence of the necessary funds, was necessary to the validity of the ordinance; secondly, whether the judgment of the superior court dismissing the action brought in such court, was a final adjudication of the validity of the ordinance.

Without reviewing all the cases wherein the question of the necessity of the auditor's certificate has been considered, it is sufficient to say that the inapplicability of Section 3806, General Code, requiring such certificate, is fully established by the application to the grade crossing act of the principles upon which the following cases have been decided: *City of Akron v. Dobson*, 81 O. S., 66-78, decided 1909; *Emmet v. Elyria*, 74 O. S., 185-195, decided 1906; *Smith v. Evans*, 74 O. S., 17-22, decided 1906; *Comstock v. Nelsonville*, 61 O. S., 288, decided 1899; *City v. Holmes*, 56 O. S., 104, decided 1897; *Pansing v. Miamisburg*, 11 C.C.(N.S.), 511-515, decided 1907; affirmed, 79 O. S., 430;

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Kohler Brick Co. v. Toledo, 19 C. D., 599-609, decided 1907; *Trowbridge v. Hudson*, 14 C. D., 76-77, decided 1902 (3 C.C. [N.S.], 644); *Cinti v. Hunningfort*, 1 D., 563-566, decided 1894; *Conneaut v. Straus*, 21 D., 87, decided 1910; *Defiance Water Co. v. City*, 90 Fed., 753, decided 1898; *City, ex rel, v. City*, 11 C. C., 309-315, decided 1896; *Kerr v. Bellefontaine*, 59 O. S., 446-463, decided 1898.

The principles underlying such decisions seem to be that Section 3806, General Code, requiring the certificate of the auditor that the necessary money be in the treasury to the credit of the proper fund, is inapplicable when the city is required or permitted to do an act in furtherance of a specific purpose involving the expenditure of money, and the statutory proceedings provided for the accomplishment of such purpose do not reasonably contemplate the necessary money being in the treasury before the creation of any liability of the city therefor, because the amount of the expenditures can not be and is therefore not contemplated to be determined in advance; or because such expenditures are to be distributed over periods of time, during each of which periods the necessary money is to be raised by the exercise of power specifically given therefor; or because specific statutory provision is made for the raising of the necessary money to pay the accruing liability independent of the general revenue producing powers of the city, the theory being that a specific power given for a specific purpose with a specific provision for the payment of the expenditures involved in the exercise of such power, can be exercised without the hording in advance by the city of money for such expenditures, even though such expenditures might be estimated definitely before any irrevocable action by the municipality in the accomplishment of such purpose, and that Section 3806, General Code, is primarily applicable only to expenditures to be paid from the general revenue producing powers of the city.

Having decided that non-compliance with Section 3806, General Code, does not invalidate the ordinance under consideration, it is unnecessary to determine the effect of the judgment of the superior court upon such ordinance if Section 3806, General Code, was applicable thereto; and it is unnecessary to determine

whether or not the cause of action in the superior court and in the present case is the same, or if not the same, whether the issues actually raised in such action are the same, nor to distinguish judgments founded upon admissions of law or fact, actual, implied or constructive, from judgments upon actual issues.

The demurrer of the city to the answer of the defendant is therefore overruled.

QUALIFICATION OF A GERMAN NEWSPAPER FOR PUBLICATION OF ORDINANCES.

Common Pleas Court of Lorain County.

STATE OF OHIO, ON THE RELATION OF THE LORAIN DEMOCRAT
COMPANY, v. THE CITY OF LORAIN ET AL.

Decided, 1912.

*Publication—German Newspaper Qualified to Publish Ordinances, When
—Bona Fide Circulation—Nationality of Subscribers—Section 4228.*

1. The term "paid circulation" is used in Section 4228, General Code, in contradistinction from gratuitous circulation. It does not mean that each subscriber shall have made satisfaction in money of his obligation to pay for the paper, but it means that he is to pay for the same and not receive it as a gratuity.
2. To fulfill the requirements of Section 4228, General Code, it is not necessary that the newspaper printed in the German language, which qualifies to publish ordinances, should have its entire circulation among persons able to read German.

G. A. Resek, for relator.

Curtis Synder, contra.

DOYLE, J.

This proceeding was instituted to compel the municipal authorities of the city of Lorain, Ohio, to publish its ordinances and resolutions in a publication called the *Lorain Post*, a publication printed in the German language in said municipality.

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State, ex rel, v. Lorain.

It is admitted that the relator is a tax-payer of the city of Lorain and was before the commencement of this suit and now is publishing in the city of Lorain a newspaper called the *Lorain Post*, and that the relator filed with the city clerk of the city of Lorain on the 20th of June, 1910, an affidavit alleging that the said the *Lorain Post* was a newspaper printed in the German language in the city of Lorain, state of Ohio, and that said newspaper had a *bona fide* paid circulation within the said municipality of not less than one thousand copies. The relator claims that all of the ordinances and resolutions of said municipality requiring publication should by virtue of Section 4228, General Code, be published in the *Lorain Post*. No issue was made on the right of the relator to maintain this proceeding, it being taken for granted that it was beneficially interested and if able to qualify under the statute was entitled to the writ.

It seems that after the filing of the affidavit, which was *prima facie* proof of the facts which were necessary to make publication of the ordinances and resolutions in a newspaper printed in the German language in such municipality necessary under Section 4228, General Code, the city authorities made some investigation of the circulation of the newspaper in question and stopped the publishing of its ordinances therein.

The evidence in this case shows that 1250 copies of the *Lorain Post* were at that time and are now printed and circulated within the city of Lorain weekly; that it has a subscription list book which shows two hundred and eighty-two subscribers within the city of Lorain; and also has nine hundred and sixty-eight cards signed by as many subscribers; that the number of persons who have actually paid their subscriptions in advance, as indicated in said subscription book and cards, does not exceed eight hundred; that twenty-five per cent. of these subscribers do not read German; that some of these subscribers who do not read German, have members in their families who do; that a majority of the persons whose names appear on the subscription lists read one or both of the daily newspapers published in the English language in the city of Lorain; that the relator is ready and willing to publish said ordinances and resolutions as required by law.

The subscription cards referred to read as follows:

"Lorain, O., ..., 191..

The Lorain Democrat Co.,
Lorain, Ohio.

Gentlemen: Please send me the Lorain Post at the following address for one year and thereafter, until ordered discontinued by me, for which I agree to pay the sum of twenty-five cents per year.

Name

Address St. Lorain, Ohio.
1910, 1911, 1912, 1913, 1914, 1915."

Such an instrument constitutes an obligation on the part of the person signing the card to pay the sum stated therein each year that the *Lorain Post* is sent to him until discontinued by him.

The defendant contends that, because all of the 1,000 subscriptions have not been paid in advance, they are not "paid subscriptions"; and that because some of the subscribers do not read the German language and that because a majority read also one or both of the English papers published in Lorain, that the relator is not entitled to have them credited as subscribers to the paper.

As to the first contention, Section 4228 reads as follows:

"Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be, and shall be published in a newspaper printed in the German language if there is in such municipality such a paper having a *bona fide* paid circulation within such municipality of not less than one thousand copies. Proof of such circulation shall be made by the affidavit of the proprietor or editor of such paper, and shall be filed with the clerk of the council."

In its general legal sense the word "paid" signifies satisfaction in money or other thing of value of an obligation due from one to another, but in its employment in contracts and in legislative enactments it may have a wider latitude of meaning according to the connection in which it is used.

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It was so recognized in the dictum in the case of *The Milwaukee Mechanics Insurance Company v. Russell*, 65 O. S., 230, at page 260.

The use of words like this in contracts and in legislative enactments must very often be construed in their popular sense. The connection in which they are used will very often determine their meaning far better than their strict legal meaning. Such construction should be made by the court for the reason that it is the intention of the Legislature which is attempted to be sought.

In a stipulation in a charter party by which the owner should receive the highest freight which he could prove to have been paid for ships on the same voyage or passage by water, the word "paid" was used in the popular and ordinary sense meaning "contracted for," and the word would be satisfied by proof of a contract for payment. *Gether v. Capper*, 15 C. B., 696, 701; 29 Eng. Law and Eq., 242, 245.

It is evident, from the sense in which the words "paid circulation" are used in Section 4228, that they are used in contradistinction from gratuitous circulation. It does not mean that each subscriber has made satisfaction in money of his obligation to pay for the paper but it means that he is to receive the paper and pay for the same and not receive it as a gratuity.

Now as to the other contention, that is, that the subscribers are not all able to read German, I think an examination of all of the cases which attempt to define what a newspaper is will show that the ability of the persons subscribing for the paper to read it does not determine the character of the newspaper. The statute requires that it should be a newspaper printed in the German language. It is reasonable to suppose that a newspaper in this country printed in any other language than English, would undoubtedly have some subscribers who are unable to read it.

The purpose of publishing ordinances and resolutions is to give them as much publicity as possible and, anticipating that there probably would be quite a number of persons in a municipality who could not read English but could read German, the

Legislature in order to provide the utmost publicity for the ordinances and resolutions, provided that if in any such municipality there was a newspaper printed in the German language, having a *bona fide* paid circulation of not less than 1,000 copies, that the ordinances and resolutions should be published in such newspaper. It would be presumed that if there were persons in that municipality who were unable to read English and could read German, that in order to read the news they would undoubtedly subscribe for a German newspaper and read it. With twenty-five per cent. of the subscribers of this paper not reading German, but some of them having members of their families who do, the supposition is that the remaining subscribers do read the German language and do read the publications of the ordinances and resolutions therein and to that extent the publication of these ordinances and resolutions gives notice to the very persons whom the Legislature intended should have notice of them.

There is nothing in this section in question that requires that the subscribers should be able to read the paper, and without something in the section requiring that the subscribers should be able to read the paper, the court can not hold other than that the newspaper in question, the *Lorain Post*, has a *bona fide* paid circulation of not less than 1,000 copies. The other part of this contention needs no comment because the fact that a subscriber to a paper may read many others does not make him any less a *bona fide* subscriber. In fact it is not uncommon for persons to be subscribers and readers of a number of newspapers.

A writ of mandamus will therefore issue ordering the defendants to publish the ordinances and resolutions of the city of Lorain requiring publication, in the *Lorain Post*, as prayed for in the relator's petition.

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SETTLEMENT OF ROYALTIES UNDER A COAL LEASE.

Common Pleas Court of Franklin County.

THE NEW YORK COAL COMPANY V. SUNDAY CREEK COMPANY.

Decided, April 15, 1912.

Accord and Satisfaction—Acceptance of Voucher in Full of Royalties Due—Bar to an Action for Recovery of a Balance Claimed Still to be Due—Contract Embodied in an Accord and Satisfaction Can Not be Varied by Parol Testimony.

Where a voucher in payment of royalties falling due under a lease of coal lands embodies an unequivocal offer to settle for the amount therein set out, which is the amount named in the lease with a deduction on account of one of the unavoidable casualties provided for in the lease, and the voucher is accepted by the lessor and is collected, it amounts to an accord and satisfaction of the claim, and parol testimony is not admissible to vary the terms of the contract embodied in the accord and satisfaction with reference to deduction made by the lessee from the gross rental falling due.

L. G. Addison and T. J. Keating, for plaintiff.
Henderson, Livesay & Burr, contra.

BIGGER, J.

The plaintiff sues to recover royalties claimed to be due under a coal lease for the years ending respectively June 30th, 1906, 1907 and 1908, and amounting in all to the sum of \$4,657.50, and interest. The defendant's contention in substance is that it has paid all that is due under the terms of the lease, and that even if its construction of the terms of the lease should not be accepted as the correct construction thereof, that the plaintiff is not entitled to recover more than has been paid, because the parties have already settled and adjusted the matters in dispute, and that there has been an accord and satisfaction.

The case is submitted to the court for decision upon an agreed statement of facts, supplemented by some oral evidence and the

argument of counsel. By the terms of the lease the sum of seven and one-half cents per ton of two thousand pounds of lump coal was to be paid for minimum amount of lump coal of one hundred thousand tons for each and every year of the lease. The language of the lease is as follows:

"And the said second party for itself, its successors and assigns, does hereby covenant and agree to and with said first party, its successors and assigns, that it will on July 1st, 1894, begin operations for the mining and removing of the coal aforesaid and will mine, properly screen with screens of the kind in general use at the mines in the Hocking Valley and remove not less than one hundred thousand tons of lump coal from said property during each and every year thereafter until all the workable and mineable and merchantable coal in the vein known as Number 6, in, upon or under said lands, has been removed therefrom, the same to be done in a careful, economical and workmanlike manner, and as customary and usual in the mines of the Hocking Valley, so as to save and put out the greatest practical amount of lump coal contained in said property, and that they will pay to the first party, its successors and assigns, every thirty days, namely, on the fifteenth day of each month, or if said fifteenth be Sunday, then on the day following, as rent and royalty, as hereinafter provided, for each and every ton of two thousand pounds of lump coal actually mined and removed during the preceding month; said one hundred thousand tons, after July 1st, 1895, to be distributed over the year in such way that in no three consecutive months shall less than fifteen thousand tons be mined and removed.

"And if the said second party shall neglect or fail from any cause to so mine and remove the said one hundred thousand tons of lump coal during any year, or said minimum of fifteen thousand tons for any consecutive three months after July 1st, 1895, it shall at the end of such year or three months, account for and pay to the first party such portion of the royalty per ton aforesaid that then be due if said number of tons had been actually so mined and removed, provided that in the case of royalty being paid in any year for the minimum tonnage, when for any reason the output has not reached the minimum, the amount so overpaid, if any, shall be deducted from the succeeding year's royalty, if the output for such year exceeds the minimum output herein provided for.

"It is hereby understood by and between the parties hereto that in case and so long as at any time it shall be impossible to

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mine and remove said minimum number of tons, as hereinbefore provided, by reason of so-called faults in the vein of coal in said land, strikes, lockouts, the lack of transportation facilities, fires or other unavoidable casualties, reference being had to such faults as have heretofore been discovered in said veins in said land, such minimum shall not apply, but the said second party shall with all possible diligence prosecute the work of protecting or driving through said faults, and shall use all possible means by running tunnels, drifts or entries in other directions, and other methods, to reach good coal, and use all possible means to mine and remove the said number of tons every three months and every year, as hereinbefore specified."

I take up first for consideration the claim of the defendant that there has been a complete accord and satisfaction.

At the respective dates provided in the lease the defendant made payments by check vouchers to the plaintiff for coal mined, as well as for unmined coal which the defendant claims was payment to the full amount due under the terms of the lease. The plaintiff admits the receipt of the check vouchers, and that they were cashed by the plaintiff, but denies that they were for the full amount due, and also denies the legal effect claimed by the defendant for the receipt of these sums of money by the plaintiff. And this renders it necessary to consider the nature of these transactions between the plaintiff and defendant under the terms of the lease. These payments were made by means of what are called check vouchers, and they are in their terms essentially the same in each case. And at this point I notice the claim made by the plaintiff that the claim of the plaintiff was in its nature a liquidated claim by virtue of the terms of the lease, which reserved a royalty of seven and a half cents per ton for a minimum amount of one hundred thousand tons of coal, and that in case of a liquidated demand that the payment of a less amount than the sum due, although agreed to be received in full satisfaction, can not be insisted upon because there is no valuable consideration to support it. Even this doctrine is not favored by the courts and has been expressly repudiated by the Supreme Court of this state in one case at least of a liquidated claim, *Harper v. Graham*, 20 Ohio State, 106. But was this

claim a liquidated one? A claim is liquidated when the amount due has been ascertained and agreed upon by the parties or is fixed by operation of law. 1 Cyc., 334; 25 Cyc., 1444.

The contract in this case does not provide that seven and a half cents per ton shall be paid annually upon one hundred thousand tons of coal at all events. That depends upon the conditions stated in the lease contract. In case of faults in the coal vein, strikes, lockouts, lack of transportation facilities, fires and other unavoidable casualties, the minimum amount of coal provided to be mined and paid for was not to apply. It is agreed between the parties that in each of the years in question here, some one of these conditions arose. In 1906 it was a strike. In 1907 it was a flood, and in 1908 a strike again. As soon as the first of these conditions arose in 1906, a dispute arose between the parties as to the amount due from the defendant to the plaintiff under the terms of the lease. At the close of the year ending June 30th, 1905, a check voucher was sent by the defendant to the plaintiff for the amount which it claimed to be due under the terms of the lease. This was promptly returned by the plaintiff with the statement that it was not correct, and it was more than two years before another voucher was sent in settlement of the same claim of the plaintiff against the defendant, which voucher was received in October of 1908, and retained and cashed by the plaintiff. It thus appears from the agreed statement that prior to the receipt of the vouchers in question in this case a dispute had arisen between the parties as to the amount due for unmined coal under the terms of this lease, and it is therefore clear that this dispute could only be settled by the voluntary agreement of the parties, or by the judgment of a court of competent jurisdiction.

The first of these vouchers which was received by the plaintiff and retained and receipted in full was that for the third quarter of the year 1907, in which it is agreed that a flood had occurred and which prevented for at least eight days the operation of the mine. This voucher, which was dated May 28th, 1907, recites that it is for royalty on coal not mined to make up the balance of minimum for the quarter ending March 31st, 1907. This

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voucher covers the royalty due on two mines, but the statement which refers to the mine here in question, and immediately following the above statement of the purpose of the voucher, is as follows:

“Mine Number 2, minimum for a quarter, 15,000 tons; allowance account flood, 1,600 tons; total, 13,400 tons; less tonnage mined, 4,249 tons; shortage, 9,151 tons, at seven and a half cents, \$686.33.”

Following this is the approval and audit of the claim by the officers of the defendant company, and then follows this recitation; “The Huntington National Bank, of Columbus, Ohio, will pay the above amount when the receipted bill is dated and signed by the person or firm in whose name this voucher is drawn.” Then follows the receipt in this language on the printed form: “Received June 1st, 1907, from the Sunday Creek Company, \$984.93 in full for above account.” It seems to the court too clear to admit of dispute that this was a proposition from the defendant company to settle the claim of the plaintiff against it for royalty upon the basis stated, and that payment was to be made of this amount only on condition that it be accepted in full settlement. The purpose is clearly stated: “For royalty on coal not mined to make up balance of minimum for the quarter ending March 31, 1907.” This language clearly informed the plaintiff that this was the total sum due according to the defendant’s view of the matter, for that quarter, and the plaintiff was clearly informed that this sum would only be paid to it on condition that it was accepted and receipted in full of the above account, and the account referred to was plainly to be for coal not mined to make up the balance due for that quarter after deducting what the defendant claimed was due to it on account of the flood occurring in that quarter.

It has been too often decided to be considered an open question that where such a dispute exists, and one party to the dispute tenders an amount in full settlement of the entire claim and it is accepted and a receipt in full given by the opposite party, that this constitutes an accord and satisfaction, and that

the party thus receipting will not be allowed afterward to litigate about the matter. The law favors the voluntary settlement of disputes, nor will it make any difference that the party thus receiving payment and receipting in full may do so with a mental reservation, or that he afterwards informs the party making the proposition that he only accepted it upon account. This was expressly decided by the Supreme Court in the recent case of *The Seeds Grain & Hay Company v. Conger*. The syllabus is:

“Where there is a *bona fide* dispute over an unliquidated demand and the debtor tenders an amount less than the amount in dispute upon the express condition that it shall be in full of the disputed claim, the creditor has but one alternative. He must accept the amount tendered upon the terms of the condition unless the condition be waived, or he must reject it entirely, or if he has received the amount by check in a letter he must return it. Where, in such case, the creditor retains a check which was sent, upon the condition that it shall be in full satisfaction of the debt claimed to be due and receives the money thereon, and notifies the debtor that the amount is placed to his credit but that he does not intend that the same shall close up the matter in dispute, to which the debtor makes no reply, such silence by the debtor does not amount to a withdrawal of the condition which accompanied the tender, nor to a waiver of it. The transaction is an accord and satisfaction.”

This decision would seem to cover the case and be decisive of it as it was first submitted upon the agreed statement of facts. Subsequent to this decision the plaintiff asked leave to introduce some oral evidence upon the question of some verbal arrangement or agreement concerning the receipt and acceptance of the voucher checks in question, and I observe first, as to this, that it can not be made to apply in any event to the voucher of May 28th, 1907, which preceded this oral arrangement in point of time. As to that voucher it clearly falls within the rule that it was a complete accord and satisfaction, and that it is none the less so because of the notification that it was only received upon account. This oral evidence was received by the court under the objection of counsel for the defendant. After careful

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consideration I am convinced it is not competent for the purpose for which it was offered. It is, of course, plain that both parties understood the tenor and effect of these voucher checks. It is clearly shown by the fact that in 1906 such a voucher was returned to the defendant by the plaintiff, who refused to accept it. This, like the others, contained upon it a receipt in full and notified the plaintiff that it was to be in full settlement for coal not mined for the year 1906, after deducting the amount which the defendant claimed it was entitled to receive as a rebate on account of the strike. It is shown again very clearly by the evidence of Mr. Poston, who went to see Mr. Field, for the very reason that he understood this was to be in full settlement and not upon account. These settlements are in writing and contain the full terms of the settlement upon their face. They were submitted by the defendant to the plaintiff in this form and all that remained for the plaintiff to do was to receipt in full for the claim, and this is done upon the printed receipted form appended to the proposition of the defendant. It is stipulated by the parties that the officers signing these negotiations wherever signed were officers and agents duly authorized in the premises. This clearly covers the signing of the receipt by the secretary and treasurer of the New York Coal Company, and shows his authority in the premises.

An accord and satisfaction is as much a contract as any other, and when the contract is in writing the same rules are to be applied to it as are applied to other contracts in writing in so far as the competency of evidence to vary or contradict its terms is concerned. While it is true that a mere receipt in writing is subject to explanation by parol, this is not true where the receipt constitutes one of the terms of a contract, and is in full settlement of a claim.

On this subject Jones says in his work on Evidence at Section 502:

“But where the receipt purports to be a full settlement or compromise of a claim, the courts have frequently refused to admit parol proof of the omission of other terms or conditions.”

That this is the rule in Ohio seems to be well settled by the decisions in the cases of *Stone v. Evans*, 6 Ohio, 246, and *Jackson v. Ely, Executor*, 57 Ohio State, 450. In this last case Judge Bradbury says in delivering the opinion on page 458:

"Whatever the general rule may be as to the reception of parol evidence to explain a mere receipt, it is not admissible, at least in Ohio, to vary the terms of a contract, although the contract should be included in an instrument which was also a receipt for money or property."

Further on, he says:

"That the above instrument is something more than a mere receipt seems quite clear from an inspection of its terms. It states that the parties had come to a settlement in respect to every claim or demand that had before then existed between them. The sum of money stated in the margin, \$15.50, manifestly, is a part of the instrument. It represents the amount found to be due upon an adjustment of whatever items were then open between them."

The learned judge then follows this language by the citation of *Goss v. Ellison*, 136 Mass., 503, with approval, in which it was decided that a writing in the following terms could not be contradicted by parol: "Received of Mr. Elmer Ruggles a note on six months for \$51 with interest, as full payment, as per claim."

The court, speaking through Morton, Judge, said:

"If this could be treated merely as a receipt it might be open for plaintiff to show by parol that it was not intended as full payment and satisfaction of his claim against Ruggles. But it is more than a receipt. It is not only an acknowledgment of the receipt of Ruggles' note for \$51 but it is a statement of what the note was received for. It was received as full payment for the plaintiff's claim against Ruggles. If the plaintiff should sue Ruggles this contract would be a bar to the suit because it is conclusive evidence of a settlement and satisfaction of the claim against him."

This case, and the language of the court, is strictly applicable to the case before us. These so-called receipts are not merely

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receipts. They are more than that. They are one of the essential terms of this contract of accord and satisfaction. They not only acknowledge the receipt of the money, but as was said in the Massachusetts case, they are an acknowledgment which can not be contradicted by parol evidence that the amount received is in full settlement of the claim of the plaintiff for the period covered by them. Here was a plain and unequivocal offer upon one side to settle for the amount claimed by the defendant to be due for the period covered by the vouchers on account of unmined coal, allowing a certain deduction to the defendant on account of the occurrence of one of the unavoidable casualties provided for in the lease, and a plain statement that if received in full of the claim, that the amount stated in the voucher would be paid by the bank and an acceptance of the proposition and receipt of the money, the whole agreement being in writing. If parol proof may be accepted to contradict this and show that this was not an agreement at all, but that it was something entirely different, what becomes of the rule against contradicting and varying the terms of written contracts by parol?

Mr. Field says it was within his power to have changed the proposition, but it was not done, but the contract which was in writing was allowed to stand and the voucher was used.

Upon the authorities cited, and many others which might be cited to the same effect, I have reached the conclusion that the defense made that there was a complete accord and satisfaction is established by the evidence before the court, and that the defendant is entitled to a finding and judgment in its favor. This dispenses with the necessity of considering the other question raised in the case.

**NATURE OF TITLE TO PROPERTY SOLD IN PARTITION
TO AN HEIR.**

Common Pleas Court of Hamilton County.

ANNIE R. LAWSON v. ALBERT McDUGAL ET AL.

Decided, May, 1912.

Title—By Inheritance and by Purchase—Property Sold in Partition and Bought in by Heir.

Where property is purchased at a sale in partition by a tenant in common that part of the title which was cast by the law of descent upon said purchaser is extinguished and the whole title vests in him by purchase. *Freeman v. Allen et al*, 17 Ohio State, 527, reluctantly followed.

Chas. W. Baker and Chas. B. Wilby, for plaintiff.
Ong, Thayer & Mansfield and James J. Muir, contra.

CUSHING, J.

This cause is now heard on the pleadings, the evidence and arguments of counsel. It is sought to partition the property described in the petition. The plaintiff, Annie R. Lawson, claims that she is the owner in fee simple of an undivided one-third interest in said real estate; that Isaac Bates, Ella Egleston and Charles M. Bates are the joint owners as tenants in common of an undivided one-third interest of said property; that Albert McDougal is the owner of an undivided one-third interest in said property, and that the other defendants, namely, Franklin H. Lawson, Fenton Lawson and Corinne Moore Lawson, F. Roger Lawson, Stanley M. Lawson and Winifred Goodall Lawson, William C. Lawson, George P. Lawson, Eleanor Johnson Lawson, Annie Lawson Wilcox, Walter D. Wilcox, Laura Lawson Ellis, Frank Ellis, Carrie Calvert Townley, Cecil A. Calvert, Lucinda B. Calvert, the unknown heirs and devisees of Eugene J. Calvert, Nettie Dixon and ——— Dixon, the un-

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known heirs and devisees of Nettie Dixon, James J. Muir, Administrator of William H. Calvert, deceased, Charles E. Roth, Treasurer, and the City of Cincinnati, have no interest in said property.

Cecil A. Calvert and Carrie Calvert Townley in their answer and cross-petition claim that the title to said property in fee simple was in Laura Calvert by purchase; that Laura Calvert died intestate, leaving surviving her William H. Calvert, her husband and sole heir at law; that William H. Calvert died intestate, leaving surviving him Carrie Calvert Townley and Cecil A. Calvert; that they are the owners in fee simple of an undivided one-half interest in the premises described in the petition by descent from William H. Calvert; that the other one-half of said property described in the petition is in the brothers and sisters of Laura Calvert.

The question to be determined in this case is the character of the title held by Laura Calvert; that is, whether the property came to her by descent or by purchase. It is the law that in partition cases, if the property is offered for sale, it may be sold either to one of the heirs to the property or to a third person; also that in partition cases where there is an election, that the title to the property taken under such a proceeding bears two characters; first, that as an election to take can only be made by one having an interest in the property, that part of the title vested in the person making the election being an estate in inheritance; and second, that the part for which a money consideration was paid is acquired by purchase.

As I understand the law stated in these two classes of cases, it is that in case of an election, the ancestral title remains in the heir as a title by descent, and that the cash payment made by one to the other or others of the heirs, extinguishes the title by descent of all the parties, except that of the one taking the property. It follows, then, that the title thus acquired is partially by descent and partially by purchase.

In passing upon a similar question, the Supreme Court of Ohio uses the following language:

"The title to so much of the land as came to the decedent by inheritance remains a title by descent, notwithstanding the proceedings in partition, but the remaining title acquired by such proceedings was a title by purchase."

Freeman v. Allen et al, 17 O. S., 527. On page 533 of the same report, the court uses this language:

"The theory of the statute would seem to be, that upon a sale the entire title may pass to the purchaser; but that on an election by a party, only so much passes as is not already vested in him; or, in other words, that the election operates, in consideration of money paid, to extinguish the title of all the parties except that of the party taking it. The party who elects to take the land, is thus left with a title cast upon him by law to the extent of his inheritance, and with the residue of the title to the full estate perfected by his own act. It follows that his title comes in part by descent and in part by purchase."

Counsel for defendants cited the case of *Groves v. Groves*, 65 O. S., 442, in support of their contention that the title of Laura Calvert was by purchase and not by descent.

In the *Groves* case the father conveyed the land to his son in 1875. The deed was of general warranty. The consideration stated was \$9,165. The son held the property until 1889. He died leaving his widow surviving him. A controversy then arose between the widow and the brother and sister of the deceased, the widow claiming that her husband held the property by purchase, and the brother and sister claiming that *Groves'* title was by deed of gift. The court in its opinion in that case say on pages 447 and 448:

"But be that as it may, it is clear that a deed of conveyance by a grantor to a near relative by blood for no consideration other than natural love and affection, and so expressed in the deed, is a deed of gift under our statute of descent and distribution. If a valuable consideration such as money or marriage to be thereafter consummated, is expressed, the title passes by purchase, and not by deed of gift.

"The parties by their deed impress upon the title the character which it is to bear in the hands of the grantee, and those

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coming after him. If they say the consideration is good only, they thereby impress upon the title the character of a deed of gift. If they say the consideration is a valuable one, they thereby impress upon the title the character of title by purchase."

Other cases are cited by counsel for both plaintiff and defendant, but I do not find that either of the cases here cited have been reversed or modified. The question then presents itself as to whether these cases are inconsistent, and if not and each states a rule governing the title to real estate, within which rule do the facts bring the case at bar?

I do not see how there can be any conflict between the two cases. In the case of *Freeman v. Allen*, *supra*, the ancestor held the property at the date of his death. He died intestate. The heirs went into court and partitioned the property. The appraisers fixed the value of one lot at \$6,000 and the other at \$7,782. An election to take at the appraised value was made and receipts were passed between the parties for the amounts of money to be paid respectively. The record does not give the form of deed, but it is fair to assume that it was the usual form of deed in partition proceedings and stated the consideration and the appraised value. On page 531 of the *Freeman* case the court makes the distinction between title acquired by an act of the party and by a title cast upon him by operation of law. The *Freeman* case, therefore, is that the part of a title that is cast upon a person by operation of law in an election to take all or part of the property, does not extinguish the title by descent, but that the part taken by his own act is a title by purchase, while in the *Groves* case, the whole title was taken by Groves, Jr., by his act in conjunction with that of his father.

In a dissenting opinion in the *Freeman* case, Judge Brinkerhoff uses this language:

"Now it seems to me that the taking of the land at its appraised value under the statute, by a co-tenant or co-heir, is simply a substitute for, and the equivalent of an actual sale; the policy of the law being to make him a favored purchaser as against strangers. And this view derives strength from the

consideration that if two or more of the co-tenants elect to take at the appraisalment, an actual sale will be peremptorily ordered, in order to swell the proceeds for the impartial benefit of all. And this conclusion is further strengthened by the fact that after an election by a co-tenant to take at the appraisalment, the sheriff conveys to him the whole of the land which he elects to take, the same as if it has been subjected to actual sale."

It seems to me in the case at bar, that notwithstanding the fact that Laura Calvert bid at the sheriff's sale for the property and took it, and in view of the further fact that her interest in the whole property was found to be \$9,362.29, and that the value of the property partitioned was \$21,205.07, and that the part she took at the sheriff's sale was of the value of \$11,243.39, that therefore the law ought to be that the part of the property that she inherited was as \$9,362.29 is to \$21,205.07. For the purpose of this opinion I shall treat the interest that Laura Calvert had in the property as three-sevenths of the whole property; that is, the title to three-sevenths of the said property was cast upon her by operation of law.

It is the law that if A die intestate and leave B and C as his heirs, that whatever title A had to real estate vested immediately in B and C by operation of law, and that the only way they may be divested of that title is either by their own acts or by a decree of a court in a proper proceeding. In the partition sale therefore, Laura Calvert had title to three-sevenths, approximately, of this property up to and at the time of the sale. The order of sale did not divest her of title to the property. The sheriff's deed could not be made until after the sale, therefore no act of court could divest Laura Calvert of her title in the property amounting to three-sevenths of the entire estate. She became a purchaser at the sheriff's sale, and must we say then, that by a fiction of law she was divested of the title by descent because she bid as against the world, and the title would be re-transferred to her by a court, in a court proceeding in another and different form than that already held by her.

Neither the sheriff nor the court ever had title to the property. Laura Calvert took a piece of property in the partition

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proceeding in which she already had an estate by inheritance. It could not be held that she purchased from herself. If not, how was she divested of the title she held by descent?

In the Freeman case, *supra*, the Supreme Court seems to have held, that the offering of property for sale in a partition proceeding, and its subsequent sale even to the persons owning it, divested the owners of the estate they held in the same property and re-transferred it to them, impressed with another and different character that it was to bear after said sale. Judge Brinkerhoff, in the dissenting opinion in the Freeman case, held that a sale in a partition proceeding was simply a substitute for and the equivalent of an election to take. And why should it not be so? The court could but determine the rights and interest of the litigants. The law provided two methods by which the value of the estate could be determined, by appraisal and by presentation to the public through the medium of a sheriff's sale.

This proceeding could not divest Laura Calvert of the three-sevenths interest she had in the property.

The court in case No. 113014 on the docket of this court could not warrant the title to the property, it could but transfer the title that the parties to the action had. Then if Laura Calvert held three-sevenths of the estate by descent, how could the court transfer to her a title by purchase in the same property? It seems to me that the law ought to be that the title to property that came by descent, devise or deed of gift ought to bear the character of ancestral property until the title to the same has actually passed out of the person on whom the same is cast.

The Supreme Court of Ohio in the Freeman case laid down a different rule.

In passing on a question of title in a partition proceeding the Supreme Court of Indiana say:

"Where a widow purchased land of which her husband died seized, at a commissioner's sale under proceedings in partition, she stands in the same condition with respect to the sale as a stranger, and takes the land by purchase and not by descent." *McMakin v. Michaels*, 23 Ind., 462.

In the court's opinion at page 464:

"With respect to her purchase at the commissioner's sale, she stands in the same condition as a stranger. It is true she paid the purchase price in part out of her portion of the proceeds of the land of which her husband died seized; but if a stranger had purchased the land, the money in the hands of the widow could not have been treated as lands descended to her from her husband."

I can not agree with the reasoning of the court in the case just cited. If the widow parted with the title she had by descent and accepted the money for the land and had a right so to do, no one would contend that the money should be treated as real estate.

But in the McMakin, the Freeman and this case, the person having a vested interest in real estate, by descent, continued to hold the title to the same to the extent of their interest, and while I can not agree with the court, I am bound by its decision.

Contrary to my own views, the conclusion, based on decision of the Supreme Court of Ohio in the Freeman case, is that Laura Calvert, at her decease, held whatever interest she had in the property described in the petition, by purchase and not by descent.

A decree may be drawn accordingly.

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Kibler, administrator, v. Glynn.

CONTINGENT REMAINDER NOT LIABLE FOR COLLATERAL INHERITANCE TAX.

Common Pleas Court of Licking County.

EDWARD KIBLER, AS ADMINISTRATOR WITH WILL ANNEXED OF PRICE GLYNN, DECEASED, v. AMANDA GLYNN, JENNIE A. CADA AND THE STATE OF OHIO.

Decided, April Term, 1911.

Taxation—Application of the Statute Providing for a Collateral Inheritance tax—Section 5331.

The devisee of a contingent remainder is not liable for the collateral inheritance tax.

Kibler & Kübler, for plaintiff.

S. L. James, contra.

SEWARD, J. (orally):

This case is submitted to the court upon the question whether a legacy devised in this will is subject to the collateral inheritance tax.

It is only necessary to read the will, which is short, a copy of which is attached to the petition, to determine the matter in controversy in this case:

"I, Price Glynn of Newark township, Licking county, Ohio, do make and publish the following last will and testament, namely:

"1. I give, bequeath and devise to my wife, Amanda Glynn, for and during her life, all of my real estate, consisting of 100 acres, more or less, of land situate in said Newark township, in which we now reside, and all and singular my personal estate, money, choses in action and effects of all kinds and description: she, however, to use and dispose of such parts or portion of said personal estate, money, choses in action and effects, as she may see fit."

The court calls particular attention to the last clause of that item of the will:

"2. I give, bequeath and devise to Jennie A. Glynn, the girl who has been raised by myself and wife, in our family, and who at this date still lives with us, the remainder in fee simple after the death of my wife in said lands, and such part or portion of said personal estate, moneys, choses in action and effects as may remain at the death of my wife."

Then he nominates Amanda Glynn to be the executrix of his estate.

The statute governing the taxation question involved in this case is Section 5331 of the General Code:

"All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, or person recognized as an adopted child and made a legal heir under the provisions of a statute of this state, or the lineal descendants thereof, or the lineal descendants of an adopted child, the wife or widow of a son, the husband of the daughter of a decedent, shall be liable to a tax of five per cent. of its value, above the sum of two hundred dollars. Seventy-five per cent. of such tax shall be for the use of the state and twenty-five per cent. for the use of the county wherein it is collected."

It is necessary to read and to refer to Section 5333 in this connection:

"When a person bequeaths or devises property to or for the use of father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, the lineal descendant of an adopted child, the wife or widow of a son, or the husband of a daughter, during life or for a term of years, and the remainder to a collateral heir, or to a stranger to the blood, the value of the prior estate shall be appraised," etc.

Now, it will be observed that this devise is made to the widow during her natural life, with power to use such portion of it as she sees fit. The object of this collateral inheritance tax is that the persons other than those excepted, shall take the estate, less the amount of the tax which is imposed upon it by the section of

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the statute. It is uncertain whether the devisee of the remainder will ever get anything out of this estate. She has a contingent remainder subject to the right of the widow to use any or all of it. Suppose that the widow would see fit to use all of this property, then the devisee in remainder would get nothing; and, as I say, the object of the section of the statute is to tax those who are without the excepted class, and take the amount of tax from their share—what they would get otherwise than by the statute.

The court does not think that this collateral inheritance tax applies to this devise in this will.

A demurrer is interposed to the petition. The court does not think it necessary to pass upon that question. The demurrer raises the question as to whether it is a trust or not, and the court having found that the devise is not subject to the collateral inheritance tax, it obviates the necessity of passing upon the demurrer.

A JAIL MATRON IS NOT A PUBLIC OFFICER.

Common Pleas Court of Hamilton County.

THE STATE OF OHIO, ON RELATION OF SARAH P. W. FALCONER,
v. CHARLES C. COOPER, SHERIFF OF HAMILTON COUNTY.

Decided, March 29, 1912.

Office and Officer—Mandamus to Compel Reinstatement of One Excluded from the Position of Jail Matron—Tenure of Office.

1. Mandamus is the proper remedy for reinstatement in office of one wrongfully ejected therefrom and to compel the issuance of a certificate for salary due and unpaid.
2. But a woman serving as matron of a jail is not a public officer, and could not become a public officer under our present Constitution, but is a mere assistant of the sheriff whose term of office expires with that of her superior, and thereafter she can have no claim upon the office or its emoluments except through reappointment by the incoming sheriff.

Charles S. Sparks, for relator.

John V. Campbell, Assistant Prosecuting Attorney, contra.

GORMAN, J.

The petition in this case was filed more than a year ago. It is an action in mandamus. Plaintiff alleges that she was duly appointed as jail matron several years ago, and continued as jail matron until January, 1911; that her salary was fixed by the Probate Court of Hamilton County in 1906 when she was first appointed at \$50 per month, upon the recommendation of Sheriff Salmon Jones, who made the appointment, and that thereafter on March 27, 1909, upon the recommendation of Sheriff Henry W. Hamann, the Probate Court of Hamilton County fixed the salary at \$60 per month, increasing it from \$50 to \$60 per month; that from March 27, 1909, to about January 1, 1911, she continued to serve as jail matron and drew her salary of \$60 per month; that on or about the first of January, 1911, the defendant, Cooper, who was the newly elected and qualified sheriff, without preferring any charge for cause, and without hearing of such charges before the probate judge of Hamilton county, and in fact disclaiming that he had any charges for cause to prefer against the relator, ordered the relator from said jail and excluded her therefrom against her protest and has not permitted her to perform her duties as jail matron since said date. although the relator has been ready and willing to perform such service at all times. The relator further alleges that on divers and sundry occasions she tendered her services as jail matron to the defendant, Cooper, since January 1, 1911. She prays that a rule may be issued to the defendant, Cooper, to show cause why he, the sheriff, should not issue a certificate to the relator for her salary, as the same shall become due and payable, and why he should not reinstate the relator as jail matron so that she can perform the duties enjoined upon her by law, and that upon a final hearing an order to issue such certificates and for reinstatement be made peremptory.

At the time of the filing of the petition on February 11, 1911, an alternative writ was issued, and the defendant on coming in upon the alternative writ, has demurred to this petition, on the ground that the allegations stated therein do not set forth facts sufficient in law to constitute a cause of action.

The authority for appointing a jail matron is found in Section 3178 of the General Code (Section 7388a, Revised Statutes).

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In substance that section provides that the sheriff may appoint not more than three jail matrons who shall have charge over and care for the insane, and all female and minor persons confined in the jail of such county, and the county commissioners shall provide suitable quarters in such jail for the use of such matrons. It is further provided that the appointment shall not be made except upon the approval of the probate judge, who shall fix the compensation of such matrons not exceeding \$60 per month payable out of the general fund of the county upon a warrant of the county auditor, upon the certificate of the sheriff. No matron shall be removed except for cause, and then only after a hearing before such probate judge.

The court is of the opinion that mandamus is the proper remedy in a case of this kind under Section 12283, General Code, which provides that:

“Mandamus is a writ issued, in the name of the state, to an inferior tribunal, corporation, board, or person, commanding performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.”

The sheriff of the county is a person and if his official position requires him under the law to issue a certificate to the relator or to reinstate her as a jail matron, or both, then it would appear that he may be commanded to do this, because the doing of it is the performance of an act or acts which the law specially enjoins as a duty resulting from his office of sheriff.

Now at the outset, if the relator is entitled to be reinstated and to have a certificate issued to her for her salary, it must be upon the ground that she is an officer, or that the position which she has held is one which entitles her to remain as jail matron indefinitely during good behavior, and regardless of who may have appointed her in the first instance. This is her claim as the court understands it; that her appointment is for an indefinite period and that she can not be removed except upon charges being filed and a hearing had before the probate judge of Hamilton county.

It is the contention of the sheriff that the relator is not an officer, but if the court should hold her to be an officer, then that the section of the statute under which she was appointed and claims to hold is unconstitutional and void, because if she is an officer,

it must be a county officer, an officer of Hamilton county, and by the provisions of the Constitution all county officers must be elected and none can be appointed, so that when this section provides for the appointment of a jail matron, if the court should be of the opinion that this is an office and that she is an officer, then the Legislature has undertaken to provide for her appointment in contravention of the constitutional provision which requires an election. It is further contended by the sheriff that if she be not an officer, but an appointee, either as a deputy, or under contract or appointment as an assistant to the sheriff, then her term of service expires with the expiration of the term of office of the sheriff who appointed her, and that inasmuch as Mr. Hamann's term of office expired on January 1, 1911, and the defendant, Cooper, was inducted into the office of sheriff on that date, the relator's services terminated on that day, unless she were reappointed by the defendant herein.

Now let us take up these questions in their order. I think that it must be clear in this case, that the relator is not an officer, nor did the Legislature intend to make her an officer. By the provisions of Article XV, Section 4, of the Constitution of this state, "no person shall be elected or appointed to an office in this state unless he possesses the qualifications of an elector."

Article V, Section 1 of the Constitution of Ohio, provides:

"White male citizens only of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding an election, etc., shall have the qualifications of an elector and be entitled to vote at all elections."

It will be seen, therefore, that the relator does not come within the class of persons who are electors under the Constitution of this state, and therefore she could not hold an office; and upon this ground, if it be contended that the position of jail matron is an office, she must fail in her contention inasmuch as she is not qualified to fill the office. It may be a consummation devoutly to be wished, and it is such in the opinion of a great many of our citizens that this provision of the Constitution shall be amended so as to include females as well as males, as electors; but until this amendment does take place, women can not hold office in Ohio, and the relator in this case is unfortunate in being classified with the disfranchised portion of the citizens of our state.

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Furthermore, if we are to hold this position of jail matron to be an office, and the incumbent therein an officer, then inasmuch as it is provided in Section 1 of Article X of the Constitution that the General Assembly shall provide by law for the election of all necessary county officers, and by Section 2 of the same article, county officers shall be elected, then this section of the statute contravenes these provisions of the Constitution by providing for the appointment of an officer and it would be the duty of the court, under such circumstances, to hold the act unconstitutional.

It was held in the case of *State, ex rel, v. Brennan*, 49 O. S., 33, that an act of the Legislature which makes provision for the appointment by the clerk of the court of common pleas of a stationery storekeeper for Hamilton county, and devolves upon such storekeeper the duty to purchase and have charge of all blank books, stationery, printing and office appliances for the offices of that county, fixing an annual salary of \$1,500, to be paid by the county treasurer from the general fund of the county, and requiring a bond in the sum of \$5,000 for the faithful performance of his duties, is an attempt upon the part of the Legislature to constitute a county office and provide for the filling of the same for a full term by appointment and that such act is in contravention of Sections 1 and 2 of Article X of the Constitution, which requires that all county officers shall be elected, and is therefore void."

It was also held in *State, on relation of Armstrong, v. Halliday*, 61 O. S., 171, that:

"The office of county warden created by an act of the Legislature, Section 409 of the Revised Statutes, is a county office and can not be filled by appointment inasmuch as it contravenes Article X, Section 2 of the Constitution."

In that case where a mandamus was sued out to compel the auditor of Franklin county to draw his warrant on the treasurer of the county for the payment of certain fees claimed to be due in a prosecution instituted before a justice of the peace by one Terry, fish and game warden of the county, it was held that the writ would not lie, because Terry held his office by appointment and not by election, and that he was not an officer and that the act under which he was appointed was unconstitutional.

In this case as in every other case in which the construction of an act of the Legislature is involved, it is the duty of the courts to uphold the constitutionality of the enactment unless it be clearly in contravention of some provision of the Constitution. The court will endeavor also to avoid holding an act unconstitutional if a construction can be placed upon the act which will enable it to stand, and at the same time give force and effect to the intent of the Legislature in passing the enactment. Now in this case, I am of the opinion that it was not the intention of the Legislature to create the office of jail matron, but rather it was the intention of the Legislature to provide for an assistant to the sheriff, or a deputy of the sheriff, if we may please to call it that, and an examination of the sections of the General Code applicable to jails and the inmates thereof will disclose that the Legislature did not contemplate making an office of the jail matron. By the provisions of Section 3157 of the General Code, the sheriff shall have charge of the jail of the county, and all persons confined there, keep them safely, and attend to the jail, and govern and regulate it according to the rules and regulations prescribed by the court of common pleas.

Now if the sheriff is the custodian of the jail and the persons therein confined, as this section provides, how can he be relieved of the duties resting upon him by appointing a jail matron or three jail matrons, as he has the right to do under Section 3178? There is no doubt that the sheriff is an officer, and a constitutional officer at that. This Section 3178 provides that the sheriff may appoint not more than three jail matrons, who shall have charge over and care for the insane, and all female and minor persons confined in the jail. But by the provisions of Section 3157, the sheriff shall have charge of all persons confined in the jail and shall safely keep them; shall attend to the jail and govern and regulate it.

It seems to the court that Section 3178, read in connection with Section 3157, if they are both allowed to stand, must be construed to mean that the matron or matrons whose appointment is provided for shall be subordinate to the sheriff and perform their duties under his direction and control. The Legislature does not appear to have made it obligatory to appoint a jail matron, but has made it discretionary. The language is

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"may appoint" not "shall appoint," or "must appoint"; so that the necessity for the appointment of one or more jail matrons in the exercise of good faith, sound judgment and with a view to public economy, should be measured by the necessity for a jail matron. In some counties it might not be considered necessary to have a jail matron, and we conceive it to have been the intention of the Legislature to leave the appointment of a jail matron to the sound discretion of the sheriff, and the number of matrons not to exceed three to be appointed, was also left to his discretion. So that whether the matron be designated as a deputy sheriff or as an assistant to the sheriff, or as an appointee of the sheriff, it appears to the court that it can make no material difference as to her tenure. It has been decided in numerous cases in this state that a position similar to that of jail matron is not an office, but merely a deputy or employe.

In the case of, *State, ex rel v. McGonagle*, 5 C.C.(N.S.), 292, an action in *quo warranto* was brought by a person claiming to be superintendent of a county children's home, under Section 930 of the Revised Statutes. In this statute it was provided that the board of trustees of the childrens' home shall designate some suitable person who shall act as superintendent of said home, who shall also be clerk of said board of trustees and shall receive for his services such compensation as the board of trustees designate at the time of appointment. He shall perform such other duties, and give security for the faithful performance of them, as the trustees may direct. It was held by the court in this case that the office of superintendent was not a public office and that the court had no jurisdiction in *quo warranto* proceedings brought by the relator.

In the case of *State, ex rel Willis, v. Taylor, Prosecutor*, 3 N.P.(N.S.), 505, it was held by Judge Dillon, of the Court of Common Pleas of Franklin County, that an assistant prosecuting attorney is not an officer in the sense that the word is used in the state Constitution, but that he is a person authoritatively appointed to assist an officer in an office provided by law.

We think that the reasoning of the learned judge in this case would apply with great force to the case at bar; that the jail matron is a person authoritatively appointed to assist an officer—the sheriff—in an office—the office of sheriff—provided by law.

The court held that the fact that the assistant prosecuting attorney is required to take an oath of office and perform many of the duties imposed by law upon the prosecuting attorney, does not, nevertheless, constitute the assistant prosecuting attorney an officer.

In the case of *State, ex rel Brady, v. French, Treasurer*, 6 N. P., 122, decided by Judge Rufus B. Smith, of the superior court of this city, it was held that, where the county treasurer appointed a collector of delinquent taxes under Section 2858 of the Revised Statutes, authorizing the county treasurer to employ collectors of delinquent taxes upon personal property, that the appointee is merely a deputy treasurer and holds his appointment only so long as his principal holds. In that case, Brady was appointed by John C. Roth, county treasurer, and he entered upon the discharge of his duties with Roth, treasurer, in September, 1908. About two months after Mr. Roth took his office as treasurer, he met his death by accident, and his successor, Tilden R. French, was appointed by the commissioners of Hamilton county. It was contended on behalf of Brady that by virtue of his appointment and contract with Roth, treasurer, he was entitled to hold his position for a period of two years. Judge Smith found in that case that Brady was only a deputy and that his term of service could continue no longer than that of his principal.

Section 9 of the General Code, among other things, provides that a deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. So that, if the relator shall be considered as a deputy of the sheriff, she can hold no longer than her principal, and when he laid down the duties of his office upon the expiration of his term, she had no further right to retain her position, except by reappointment by the new sheriff.

In the case of *State v. Kendle*, 52 O. S., 346, it was held by the Supreme Court that the jury commissioners of the county appointed by the judges of the court of common pleas of the district were not officers, and therefore the act providing for their appointment was not in contravention of any of the provisions of the Constitution. On pages 355 and 356, the court says:

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"It is also claimed that the statute is invalid, because it provides for the appointment of the members composing the commission, instead of their election by the electors of the county, as is required in the case of all county officers by Section 2, Article X of the Constitution."

But the court held that they were not officers. On page 356, the court says:

"The power of the Legislature to provide for the appointment of persons to act as *assistants* in an office filled by election has not, and can not well be questioned. It is on this principle that the appointment of deputy clerks, deputy sheriffs, and so forth, are made and recognized, each of whom perform many, and in some cases all, the duties of the office in which he acts as deputy. So as to these commissioners. They are appointed by the common pleas judges to assist in the administration of justice, as are master commissioners and court constables. They are but handmaids of the court in the selection of judicious and discreet persons to serve on such juries as are required in the trial of causes, and the presentment of indictments."

The reasoning employed by the court in this case may well be applied to the case at bar. The appointment of the jail matron as an assistant in the administration of the office of the sheriff, taking care of the inmates of the jail, especially those who are unfortunate, being insane or minors, or of the women therein, is but a handmaid of the sheriff.

In the case of *State, ex rel. v. Jennings*, 57 O. S., 415, an action in *quo warranto*, it was held that where an ordinance of a municipality provided for a fireman and defined his duties requiring him to take an oath of office, give bond and perform such duties as are usually performed by a chief of a fire department paid by the month for his services out of the public treasury, is not a public officer, and notwithstanding the length of the term of his appointment, he could not be ousted on the ground that he had not been appointed by the mayor and confirmed by the council. He was held to be a mere appointee or assistant.

In the case of *State, ex rel. Wolfe, v. Schaffer*, 6 N.P.(N.S.), 219, it was held that the position of a court constable or a court bailiff is not an office and that the incumbent thereof is not an officer, although he is appointed by the court, required to take an oath for the performance of his duties and perform very grave

duties in assisting the court in the administration of justice. Judge Killits, now on the federal bench, decided this case, and held that neither the position of a deputy sheriff nor court constable is a public office.

In the case of *Theobald v. State, ex rel*, 10 C.C.(N.S.), 175, before the Circuit Court of Montgomery County, the opinion being announced by Judge Smith of our own Circuit Court, he defined an officer in the sense in which the word is used in the Constitution of Ohio, as an individual who takes the oath of office and becomes responsible to the public for his own official acts and those of his subordinates.

Now if we apply this rule to the case at bar, the relator in this case was not primarily responsible to the public for the performance of her duties, but to the sheriff, and he is the only one under the statute who had the power to prefer charges for a hearing before the probate court to remove her.

A very strong case, in fact one much stronger than the case at bar, is the case of *Palmer v. Zeigler*, 76 O. S., 210, in which the Supreme Court held that:

“The superintendent of a county infirmary is not the holder of a public office within the meaning of Section 6760, Revised Statutes, and *quo warranto* is not the proper remedy to oust him from office.”

By the provisions of the statute a superintendent of a county shall be appointed by the directors of the county infirmary and he shall reside in some apartment of the infirmary. He shall receive compensation for his services to be determined by the directors of the county infirmary, and can not be removed by the directors of the infirmary, except for good and sufficient cause. He is required to receive all persons into the infirmary, to make elaborate reports, take an oath of office, give bond for the faithful performance of his duties, to receive and collect money, account for the same, take charge of inmates, and perform a great many duties such as officers ordinarily perform. In this case a superintendent had been appointed by a former board of directors of the infirmary, and he claimed the right to hold over after a new board of directors of the infirmary was inducted into office, just as the relator in this case claims the right to hold after the new sheriff took office. The new directors of the in-

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firmly appointed Zeigler, and Palmer, the incumbent, resisted Zeigler in taking possession of the infirmary buildings and property. The court held that the superintendent of the infirmary is a mere employe or contractor under oath and bond, limited on all sides in his authority, and that upon the expiration of the term of office of the directors who appointed him and the induction of new directors of the infirmary into office, he was not entitled to hold his position except by the appointment, consent or acquiescence of the new directors. Notwithstanding the provision of the statute which requires that the superintendent of an infirmary shall not be removed by the directors except for good and sufficient cause, the Supreme Court in this case, on page 227, disposes of that proposition in the following language:

“However, if he was a public officer, he was such only during the term for which he was appointed, which ended on the first day of April, 1905. On that day Zeigler was entitled to take possession, and Palmer no longer had the title or color of title to the position. He became a trespasser when he refused to yield possession and retire. He was not removed from office, but his term had expired and therefore no reasons were to be assigned, as in case of removal.”

In the case at bar, the sheriff takes the position that by the expiration of the term of office of Sheriff Hamann, the matron's term of appointment also expired and that she was not removed, nor was it necessary to remove her. She simply has ceased to be a matron by the expiration of the term of her superior officer. Her appointment fell with the expiration of the term of the sheriff who appointed her. So that it was not necessary to remove her, nor was it necessary to prefer any charges in the probate court or to have a hearing thereon.

It has been suggested that some force must be given to the language of the state, Section 3178, which provides for preferring charges and a hearing before the probate court.

We think that the construction suggested by counsel for defendant is the correct one with reference to this part of the statute. That during the term of the sheriff who appoints the matron, the matron appointed by him can not be removed from her position without charges being preferred and a hearing had in the probate court. But this rule does not apply when the

sheriff who appoints the matron has become *functus officio*, and with the expiration of his term of office, all of his deputies, appointees, clerks and assistants come to the close of their tenure.

This we think is the proper construction to give to this language, in view of the statute, Section 9 of the General Code, and other authorities that might be cited.

It is said in the 29th vol. Cyc., 1395, under the title of "Officers":

"Deputies, whether common law or statutory, are, where their terms are not fixed by statute, supposed to be appointed at the pleasure of the appointing power, and their deputation expires with the office on which it depends. Deputies must, from this point of view, be distinguished from assistants to whom a fixed term has been given by law."

Now in the case at bar, no fixed term is given to the matron, and it would seem that her tenure is analogous to that of a deputy who holds without any fixed term.

Throop on Public Officers, says:

"A deputy's commission in the absence of any statutory provision to the contrary, runs only while the principal's term lasts; if the principal is re-elected or reappointed the deputy must be appointed anew."

The sheriff of this county holds his office for two years and his deputies, clerks and appointees can hold no longer than he holds without the consent, acquiescence or appointment of his successor. It would indeed be an anomalous situation for the Legislature to authorize one officer to appoint for an indeterminate or indefinite period a person as deputy or assistant and foist that deputy upon his successor without his consent, without his approval, in face of the fact that the person might be obnoxious to his successor, although subordinate to the officer, in the performance of his duties.

Furthermore, it is a grave question whether or not the relator in this case would be entitled to have a mandamus issue to require the sheriff to issue to her a certificate for her salary upon this ground. It is held in this state that the compensation to be paid to an officer depends upon the performance of the duties and that when no services have been performed, no compensation can be

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paid, and this regardless of the fact that the officer might have been ready and willing to perform, but was prevented from performing his duties by a superior officer.

It was held by the Supreme Court in the case of *Steubenville v. Culp*, 38 O. S., 18, the opinion announced by Judge Longworth, that, a police officer suspended from office by a mayor of a city under authority granted to the mayor to do so, is not entitled to wages during the period of such suspension, notwithstanding the fact that council afterward declared the cause of suspension insufficient. On page 23 Judge Longworth says:

“Was he entitled to wages during this period? (During period of suspension.)

“In *Smith v. The Mayor*, 37 N. Y., 518, it was held that no claim could be brought for salary or perquisites against a municipal corporation covering any period when the complainant was not actually in office, for the reason that salary and perquisites are the reward of express or implied service, and therefore can not apply to one who could not lawfully perform such service.

“To this extent the doctrine cited was announced in *Auditor v. Benoist*, 20 Mich., 176; *Shannon v. Portsmouth*, 58 N. H., 183; *Attorney-General v. Davis*, 44 Mo., 131, and is clearly laid down and justified in the later case of *Westberg v. City of Kansas*, 64 Mo., 493. Indeed, I have been unable to find any case in which a contrary rule has been upheld. Offices are held in this country neither by grant nor contract, nor has any person a vested interest or private right of property in them.”

Our circuit court in the case of *State, ex rel Cronin, v. Eschely, Comptroller*, 2 C. C., 468, approved and followed this decision of *Steubenville v. Culp*, *supra*. This last case was an action in mandamus by the relator, Cronin, to require the city to pay him the sum of \$1,500 salary as wharfmaster. Cronin was appointed wharfmaster by the city council. In the spring of 1885 after Cronin's appointment, one Carson was elected by the people as wharfmaster. Cronin brought an action in *quo warranto* against Carson, and the Supreme Court ousted Carson and held that Cronin was entitled to the office, and reinstated Cronin in the office. Cronin then brought suit for the salary during the time that Carson occupied the office and the circuit court held that although Carson wrongfully held the office, he drew the salary and Cronin could not recover from the state.

So that in the case at bar I am of the opinion that the relator, not having performed the duties of jail matron since January 1, 1911, is not entitled upon this ground to a mandatory order directing the sheriff to issue to her a certificate for her salary.

Nor should a mandatory order be issued to the sheriff to reinstate the relator for this reason: it appears that under the section of the statute providing for the appointment of jail matrons, the appointment must be approved by the probate court, and the compensation of the appointee as jail matron shall be fixed by said court at not exceeding \$60.

Now there is a discretion vested in the probate judge of the county to approve the relator's appointment and to fix her salary, and it has been universally held that a writ of mandamus will not lie to compel an officer to perform an act which is discretionary or in which he has a right to exercise a discretion. It would be useless to issue a mandatory order to the sheriff to reinstate the relator in this case unless the judge of the probate court could also be compelled to approve her appointment and fix her salary. It is not sought in this proceeding to do this, but even if it were, it has been held in the case of *State, ex rel Smith, v. Robson*, 3 N.P.(N.S.), 5, by Judge Allread of the Common Pleas Court of Darke County, that a mandamus will not lie to compel a judge of the probate court to approve the appointment and fix the salary of a jail matron. It was sought in that case to mandamus the judge of the probate court to approve the appointment made by the sheriff of a jail matron, and to fix her salary, upon the averment that the probate judge of the county refused to approve her appointment or fix her salary. The ground upon which this decision rests is that courts have no authority in the absence of the abuse of discretion, to control or direct a defendant in the exercise of a discretion confided in him by law.

It would seem, therefore, that upon the two latter grounds also a mandamus should not issue in this case.

The judgment of the court, therefore, is that the demurrer to the petition will be sustained on the ground that the allegations thereof do not state facts sufficient in law to constitute a cause of action.

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ACTION FOR INJURIES SUFFERED AT THE HANDS OF A MOB.

Common Pleas Court of Franklin County.

JOHN A. GRAY V. ALBERT M. GIBSON ET AL.

Decided, February 28, 1912.

Mobs—Statutory Remedy for Violence by, Limited to Lynching—County Not Liable for Mob Violence Within Municipal Limits, When—“Correctional Power” Not Synonymous with the Power Attempted to be Exercised by Strikers—Words and Phrases—Sections 6278, 6283 and 10213.

1. The statutory provision for recovery of damages by persons who have suffered at the hands of a mob is limited to injuries, whether fatal or otherwise, suffered from a mob attempting to lynch another, and does not embrace injuries resulting from violence by a mob having no intent or purpose to lynch.
2. No legal responsibility attaches to a county for injuries resulting from the violence of a mob acting within the limits of a municipality, until such a degree of disorder has developed that the mayor becomes satisfied he can no longer cope with the situation and calls upon the sheriff to aid in the suppression of said violence.
3. In an action for recovery of damages caused by a mob, whether brought by the injured person or a third person, the word “and” can not be read “or” in the phrase “assaulted and lynched” as used in Section 6281.
4. The phrase “correctional power,” as used in the statutes relating to mobs, applies only to acts of violence by a mob against one apprehended for committing a crime, and can not be applied to the power exercised by a collection of strikers or strike sympathizers in attempting to intimidate or drive out strike breakers.

L. E. Andrews, for plaintiff.

Edward C. Turner, H. C. Sherman and H. S. Ballard, contra.

KINKRAD, J.

I may say to counsel that I spent the best part of the night working on this problem, because it is an important question.

Whenever a judge is unable to satisfy his mind in preparing a charge to submit the case to the jury, it is pretty clear that under such circumstances there isn't anything to submit, and it becomes the duty of the judge then to decide the matter.

I have reached the conclusion at a very considerable effort made in studying the matter, that this plaintiff has no right to recover, and, for the purpose of making the record, I will give my views.

Plaintiff alleges that the defendants are the county commissioners, and that this action is brought against the defendants in their official capacity as the board of county commissioners of the county.

He avers that on the 25th day of July, 1910, while he was in the lawful and peaceable pursuit of his business, and being in the front yard of the place of residence at 518 West Broad street in the city of Columbus, in the county of Franklin, he was injured by one or more persons who were a part of a large collection of people who had previously assembled together in the immediate vicinity of said place for an unlawful purpose and with the intention of doing damage to and of injuring certain people whose names are unknown to this plaintiff, and who were then and there passing along and upon the said street in front of the above mentioned place of residence, and also for the purpose of doing damage to and injuring people whose names are unknown to this plaintiff, who were then and there riding upon the cars of the Columbus Railway & Light Company, which were passing on the said street in front of the residence named and which said people so assembled together were then and there pretending to exercise correctional powers over said persons who were so passing along and upon said street and who were so riding upon the cars passing on the street, by violence, and without authority of law, and contrary to law.

It is alleged that all of these facts were well known to the defendants, that is the county commissioners, and that defendants neglected and failed to use and employ the reasonable and proper means at their disposal to protect the plaintiff from the injury.

The question is whether plaintiff is entitled to maintain this action upon the pleadings and the evidence offered in support thereof.

It appears that about twenty-five or thirty persons had collected together near a bill board and near a saloon on the op-

posite side of the street from where the plaintiff was sitting out in front of the place where he took his meals. The evidence is that the plaintiff was struck on his knee while sitting down at the place stated. No one testified that he saw the piece of brick which struck plaintiff when it was thrown or saw where it came from, or even saw it at all until after it had struck the plaintiff. All testify that it came from the opposite side of the street from where plaintiff was sitting, that is, from the south, and that they heard a crash in a street car which was moving along between plaintiff and the crowd on the opposite side of the street. The inference is that because of the pending strike and because of the operation of the street cars during the said strike, that the small crowd of persons collected together on the opposite side of the street from where plaintiff was sitting was antagonistic to the railway company and to the persons operating the car. The evidence discloses that there were cries of "scabs" made to those running the car. There is no positive evidence that any one in this collection of persons threw the piece of brick which hit the plaintiff. There is only a possible inference that such was the case.

The original enactment for the suppression of mob violence was no doubt designed to make the county liable for acts of violence unlawfully and intentionally exercised by them against the body of the person whom they intended to damage or injure.

The original act provided that any person assaulted by a mob and suffering lynching at their hands, may recover damages. It now reads "A person assaulted and lynched by a mob may recover from the county in which such assault is made."

The statute provides that an act of violence by a mob upon the body of any person shall constitute a lynching. Now to constitute a mob, there must either be a purpose and intent of the collection of the people to damage or injure someone, or there must be a pretense by a collection of persons to exercise correctional power over other persons by violence and without authority of law to give rise to any liability in favor of one assaulted.

It is clear, therefore, that to give rise to any liability on the part of the county, there must be either the intent to injure, or

to exercise correctional power over persons by violence; and lynching can only be committed within the statute when it is accompanied or characterized by either one of these purposes and intent.

The plaintiff can recover under Section 6283 only when he has suffered injury from a mob attempting to lynch another person. There can be no question about that. It is the plain reading of the language of the statute, and lynching is defined in the first section of this mob statute. I may say that lynching has always been understood to mean a certain thing, and it has been given a qualified meaning in this statute in order to cover cases where the person who is assaulted and attempted to be lynched does not suffer death. In other words, a recovery can be had by the third person only when under Section 6281 a person has been assaulted and lynched by a mob under such circumstances as will give rise to an action in favor of such person so assaulted, and not otherwise, unless it may be concluded that by the terms of Section 6283 he may recover when a collection of persons intending to damage or injure anyone, or when pretending to exercise correctional power over other persons by violence and without authority of law, which may be considered a mob, "are attempting to lynch another person."

Now that statute giving a third person a right to recover is peculiar. He may recover when anyone has been assaulted and lynched, or when a mob, within the meaning of the statute, has assembled and assaults a person, or attempts to lynch someone. The limitation of the third person's right of recovery seems to be only when such a mob has merely attempted to lynch another person. Now, there isn't anything of that kind in this case.

The right of the third party to recover under Section 6283 being dependent solely upon an attempt being made by a mob to lynch another person, such right of action can not be maintained, unless there is at least an attempt by a mob, having "the intent to damage or injure a particular person," or pretending to exercise correctional power over other persons by violence, to commit an act of violence upon the body of any person.

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Chapter 20 of the code, and that is this mob statute, must be taken and considered together as it was in its original enactment in order to arrive at its correct meaning.

As originally enacted April 10, 1896 (92 O. L., 132), it was an act for the suppression of mob violence, defining a mob, prescribing what constitutes lynching, and affording a remedy to any person assaulted by a mob and suffering lynching at their hands in favor of the person if merely injured, and in favor of his personal representative if death resulted. An amendment was made to the law—I have not the exact date—in 93 O. L., 162, Section 6, which gave a remedy to a person suffering death or injury from a mob attempting to lynch another person.

The prime purpose of this enactment was to afford a remedy for injuries from what is commonly understood by lynching. And lynching being defined in the statute as an act by a mob (it being necessary that the mob shall have the intent and purpose prescribed by the act) inflicting an act of violence upon the body of any person, it follows that to afford a remedy to a person claiming the right as plaintiff does in this case, it must appear that the mob was attempting to lynch another person. There is no evidence, of course, appearing in this case warranting any such conclusion. The theory of this case is an entirely different one. The theory is absolutely foreign, in my judgment, to the purpose of this law. It has no possible relation to it. There is no evidence in this case tending to show an attempt at an act of violence by a mob, as that term is defined in the statute, to commit an act of violence upon the body of anyone. Neither is there any evidence that it was the intent of the collection of people, as disclosed by the evidence, to damage or injure any person. All that we have is some evidence of some noise, as if a piece of brick came through the windows of the car. It may reasonably be inferred from that that it might have been the purpose of some one who did such an act to merely injure property rather than it was to injure any particular person. And, of course, that would not be within the meaning of the law. It is impossible to infer that there was even an attempt to commit an act of lynching, which is the sole measure of the right of recovery under Section 6283,

The purpose of the act is clearly disclosed by Section 6281, providing, as it does, that "a person assaulted and lynched may recover" and so on. It manifestly contemplates that the assault must be for the purpose of lynching. We can not construe the section to read "assaulted or lynched" because the statutory provision 10213 authorizing "and" to be read as "or," does not apply, and the fact that some statutory rule of interpretation enabling that kind of an interpretation to be given under certain circumstances, is an indication of the soundness of the rule that you can not, in the absence of statute, construe the word "and" to mean "or," and therefore, it must take the combined acts, assaulted and lynched, in order to give the right to anyone, be it the injured person or the third person, to recover by virtue of this act.

The fact that this section makes the right of recovery dependent upon the fact of assaulting and lynching, discloses the primary purpose of the enactment to be to provide a remedy in cases of assaults by a mob with the required intent, and resulting in acts of lynching, causing serious injury or death, as well as to afford a remedy in favor of a person other than the one attempted to be lynched who has suffered death or injury from a mob while attempting to lynch another person.

There is nothing to warrant a claim being made that there was a collection of people pretending to exercise correctional power over other persons by violence and without authority of law. If by any stretch of imagination such a claim could be made in this case, it would have to rest upon the theory that the so-called mob of twenty-five or thirty persons, as disclosed by the evidence here, was endeavoring to exercise some correctional power over the "strike breakers" who were running the cars. Such a view, however, is impossible. The "strike breakers" had a legal right to do what they were doing, and if there could have been any purpose in the assemblage of persons under the circumstances as shown here, toward those who were running the car, it was rather to cause them to desist in their operation of the cars. It was not an endeavor to exercise any correctional powers over them in the sense and meaning of this statute.

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When anyone is in jail charged with some crime, and the people, as we have seen instances here in Ohio, feel that that man ought to be punished quickly and do not want to wait for the court and jury, and they take it into their own hands to correct him for his deed, that comes within the statute. But it does not point to anything like this. It is as foreign as can be to this kind of a transaction. The undoubted meaning of the language of the statute with respect to endeavoring to exercise some correctional power over another person is that it is to prescribe a statutory penalty for acts of violence by a mob against any one who has committed a crime, as if to correct him. And the purpose of the law is to compel those who are entrusted with the duty on behalf of the state and of the municipality or county, to perform their duty honestly and correctly in the matter of the enforcement of the law. And the penalty prescribed against the county is to set an example to those whose duty it is to enforce the law, that they must do it at the expense of the county if they fail.

This view finds support in *Commissioners v. Church*, 62 O. S., 318, on page 344. where Judge Davis makes the following statement:

"Even a criminal," he says, "has some rights which can not be forfeited." He means by that, of course, that the criminal must have his day in court; that he should not be lynched. "Every person who is accused of a crime, is guaranteed a fair trial; and he can not be deprived of life and liberty without due process of law. The faith of the body politic is pledged to make good the constitutional guarantees to the individual." Now mark this "To the counties and municipal corporations are delegated, in large measure, the duties of local administration. Within their jurisdiction they stand in the place of the state, in enforcing laws, and in protecting life, the liberty and the property of the citizen. If a large number of the people of any county become imbued with the lynching spirit," or we might say with the mob spirit and the riot spirit, "or negligent and indifferent to the due and orderly enforcement of the laws," and we certainly had an illustration of that during the strike, "so

that lawless men act with impunity, then there is no course for the state to take, other than to intervene and directly protect the individual, as well as to enforce upon the community the observance of good order."

Now, in that case from which the quotation was just made, the question was the liability of the county for death caused by the lynching of a person confined in the county jail. And the court expressed the view that the Constitution extends to the protection of individuals and counties and municipal corporations alike. Now just notice that. The purpose of the law is to protect not only the one who is injured, but it is also the purpose to protect the county and the municipality, and to give neither one a preference.

And this rule of equal protection to all is the undoubted aim of the law. And we believe that the construction which we have placed upon the law in question is the only one which will do equal justice as between individual, municipality and county. We do not believe that it was the intention to so extend the law in question by any process of stretched construction as to make the county liable for acts over which it has not primary, immediate and direct control. We do not believe that the law was designed to do more than to afford a remedy against the county when it owed a direct and specific duty to guard and protect persons when the law makes it its duty so to do. When one charged with crime is in the custody and control of officials of the county, this so-called mob law is designed to compel the county, through its officials, at its peril to properly exercise its duty. Now that is the only purpose of that law. No one ever dreamed of making any other use of that law until these cases were filed in this county.

It seems to be a monstrous proposition to hold that this law, limited as we believe its provisions are for the specific purposes provided therein, was designed to make the county legally responsible for the neglect or failure of the proper officials of a municipality who are to enforce the law and to protect its citizens, who are primarily and specifically charged with the immediate duty of suppressing the violence of mobs or riots within the municipality.

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Now we know very well that the county never can owe any duty in case of a mob or riot within a municipality, excepting as is provided by law, when the mayor of the municipality believes himself unable to cope with the conditions and he acts under the statute and calls upon the sheriff to aid in the suppression of violence. Then, and not until then, does the county owe any duty with reference to that particular matter. All of the duties up to that point are imposed upon the mayor of the municipality, and that is one of the strongest reasons, if we are desirous of doing absolute and equal justice between the individual injured and the municipality and the county, why we should give the construction to the law which we have here given.

For these reasons, gentlemen of the jury, the court will sustain the motion and direct you to return a verdict in favor of the defendants.

PROCEEDINGS FOR DESIGNATING A MUNICIPAL DEPOSITORY.

Common Pleas Court of Hamilton County.

STATE OF OHIO, EX REL THE VILLAGE OF PLEASANT RIDGE, V.
JOHN W. KELLERMAN, TREASURER OF THE VILLAGE OF
PLEASANT RIDGE.*

Decided, May 8, 1912.

Municipal Corporations—Validity of an Ordinance Designating Legal Depositories—Mandamus to Compel Compliance by the Treasurer.

Doubts as to the validity of an ordinance providing for the deposit of public funds in certain banks as legal depositories will be resolved in favor of a treasurer objecting to compliance therewith, and a writ to compel such compliance will be refused where it appears that the ordinance was not published for fifteen days, or

* In a memorandum opinion filed on June 1, 1912, the circuit court held:

"Under Sections 4227, 4232 and 4233 of the General Code we do not think sufficient time had elapsed before bids were received for the deposit of the public money coming into the hands of the village treasurer, and the judgment of the court below is affirmed."

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the advertisement for bids not made for two weeks, or less than twenty-nine days elapsed between the passing of the ordinance and the award.

Chas. B. Smith, for plaintiff.

Bennett & Utter, contra.

DICKSON, J. .

The plaintiff, as a tax-payer, sues the defendant, the treasurer of the village of Pleasant Ridge, Ohio, to compel him to place the public money which he holds and for which he and his bondsmen are responsible, in certain banks as legal depositories in accord with the terms and conditions of a certain ordinance. The defendant demurs because the petition on its face discloses that the law has not been complied with as to the times of publication of the ordinance and the bids, and therefore he has no right to place the public money which he has as a public official, in those depositories designated by that ordinance, and that if so placed he and his bondsmen will not be released for any loss occasioned thereby.

When one undertakes with his surety to handle money belonging to the public, the law holds both to a strict accountability. The money must be kept for the public and returned to the public. The excuse of an invalid ordinance would not obtain. Any and all doubts as to the validity of the ordinance and its provisions should be resolved in favor of such a treasurer and his bondsmen. There was no need of haste in passing the ordinance in question, and the court is in doubt whether the "emergency measure" clause is warranted in this ordinance.

The court is of the opinion that the ordinance should have been published for fifteen days, and the advertisement for bids should have been made for two weeks. Twenty-nine days should have elapsed between the passing of the ordinance and the award. The petition discloses that the ordinance was passed on February 7, 1912, and that bids were received before February the 26th. The writ will be refused.

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TITLE TO RAILWAY RIGHT-OF-WAY.

Common Pleas Court of Lorain County.

JOSEPH R. MILLER v. L. S. & M. S. RAILWAY CO.

Decided, 1911.

Railways—Agreement for Use of a Right-of-way Ripens Into Title Thereto, When—Breach of Agreement as to Manner of Use of Right-of-way Will Not be Enjoined, When.

1. A contract releasing to a railway company a right-of-way across certain lands does not operate to convey the title to said strip, where not executed and acknowledged in accordance with the laws then in force for conveyance of real estate; but the subsequent construction of the road and its use along said right-of-way entitles the railway company to a conveyance of the said strip of land for said purpose.
2. As against a subsequent grantee of the lands crossed by the right-of-way the railway company is the owner of the strip, notwithstanding the deed to said grantee contained no reference thereto.
3. A railway company which has agreed for a valuable consideration not to locate a track in a certain manner on its right-of-way, and subsequently finds it necessary to disregard this agreement in order to properly discharge its duty to the public, will not be enjoined against a breach of its agreement, but the owner of the land will be remanded to a suit for the damages growing out of the breach.

D. J. and D. F. Nye, for plaintiff.

E. G., H. C. and T. C. Johnson, contra.

WASHBURN, J.

On the 17th day of June, 1851, Frederick Onstine was the owner of lands in Lot No. 3 in the township of Amherst, Lorain county, Ohio, upon which he then resided, and on that day he executed the following release or contract:

“From F. Onstine of Amherst, Lorain Co., O., to the Junction Railroad Company. Know all men by these presents, that I, Frederick Onstine, in consideration of three hundred dollars, hereby grant to the Junction Railroad Company, and its assigns, the right of using a strip of land, not exceeding one hundred feet

wide, on and over the lots described below, for a railroad; and the privilege of entering on said lots below described, to survey, construct and repair and use said railroad; and I hereby release to said company all damages which have or may accrue herein. The lots intended are the following, viz: Lot No. 3 in the township of Amherst, and being the farm on which I reside, and the twenty-eight acre lot joining Judge Harris' land in said Amherst.

"In Witness of Which, I set my name and seal this 17th day of June, 1851.

"(Signed) FREDERICK ONSTINE.

"In presence of E. DeWitt.

"Received of E. DeWitt, treasurer of the Junction Railroad Company three hundred dollars, being in full for the within release. March 15, 1852.

"(Signed) FREDERICK ONSTINE."

Said contract was not acknowledged before any officer and has never been recorded in the records of the county.

In pursuance of said writing the railway company named therein soon thereafter entered upon the land and constructed and has ever since operated its railway across the lands of said Frederick Onstine in Lot No. 3 in said township. Said contract or release, although it purported to "grant" the right-of-way to the railway company, did not operate to convey the right-of-way to the railway company for the reason that it was not executed and acknowledged as required by the laws then in force for the conveyance of real estate. But the subsequent construction and operation of the railway on such right-of-way in equity entitled said railway company to a conveyance of said right-of-way for railway purposes.

On November 26, 1853, Frederick Onstine conveyed to James F. Clark the premises through which said railroad had been constructed in Lot No. 3 and in that deed is the following, as a part of the description of the premises conveyed, to-wit: reserving and excepting the land heretofore conveyed to the Junction Railroad Company.

On April 23d, 1857, James F. Clark deeded said land to Henry E. Werner. Said deed containing the following language, as a part of the description of the premises conveyed, to-wit: reserv-

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ing and excepting, however, the land heretofore conveyed to the Junction Railroad Company by Frederick Onstine.

On September 7th, 1867, said Henry E. Werner conveyed said premises to the plaintiff, Joseph R. Miller; said last named deed containing no reservation in reference to or mention of said railway.

Said railway was then in operation across this land and had been in operation for twelve years, and all the rights of said Junction Railroad Company have been succeeded to by the defendant railroad company; and said railroad has been in continuous operation across this land since 1852.

The plaintiff, Miller, knew when he purchased said land that the railway company was and had been for a number of years in possession of said right-of-way, using the same in the operation of its railway and claiming the right to so use it, and he was charged with constructive knowledge of and was bound by the reservations in reference to said right-of-way contained in the deeds of his predecessors in title. Under such circumstances, as against Miller, the plaintiff, the railway company was the owner of such right-of-way (41 O. S., 382).

Neither is it true, as claimed by the plaintiff, that the legal title is in him. No one conveyed this legal title to him who ever had the legal title. Frederick Onstine, the common source of title, never attempted to convey this right-of-way except as he attempted to convey it to the railway company, and in his deed to Miller's predecessor in title he expressly excepts and reserves the right-of-way from the operation of his conveyance. Hence, not even the legal title is in Miller. But if it was in Miller the railway company has that which for all railway purposes is the same as the fee simple title—that is all the railway company can acquire, even by condemnation proceedings or purchase—the right to use the property for railway purposes.

The dwelling house of Miller upon said premises was situated *north* of and close to the railway right-of-way. Miller owning the land both sides of the railroad, using a farm crossing to get from his dwelling to the highway on the south.

In 1879 the railway company purchased of Miller a strip of land for additional right-of-way on the *south* side of the origi-

nal right-of-way, and in the deed which Miller executed and delivered to the railway company of such additional right-of-way and by which Miller recognized the railway company as the owner of said original right-of-way, was the following provision:

"It is also stipulated and agreed between the parties hereto as a part of the consideration for this conveyance * * * Second, that there shall be no tracks north of the present tracks in front of Miller's house while said house is occupied as a dwelling except as may be necessary in the work of excavation for the change of grade. * * * Sixth, that the sod on the right-of-way between Miller's house and the tracks shall not be removed by said company except as much as may be necessary in excavating for the change of grade and after the same is completed said company shall restore the cut to uniform slope and leave the banks in as good condition as may be, considering the nature of the work done."

Said conditions or restrictions do not relate to the property conveyed by the deed in which they are found, but to the use to be made by the railroad company of its original right-of-way north of its tracks and between its north track and Miller's house. This action is brought to enjoin the defendant from constructing and using tracks upon that part of its original right-of-way mentioned above.

The defendant admits its intention to do so unless prevented by the court, and by proof has satisfied the court that to properly discharge its duty to the public it is necessary to use for trackage purposes that part of this original right-of-way which it agreed by accepting said deed not to so use. The question for determination is, should a court of equity enjoin the defendant from so using its right-of-way or leave the plaintiff to his remedy for damages for the breach of said contract?

It is well settled that where a railway company is about to take an easement or interest in land, the property of another, a court of equity will enjoin it from taking such property until it has acquired the right to do so either by condemnation proceedings or purchase from the owner, for the reason that the Constitution of the state provides that such property can not be taken without first making compensation therefor.

1912.]

Miller v. Railway.

It is equally well settled that equity will not enjoin the breach of a contract where there is an adequate remedy in damages for such a breach.

If the contract here in question granted to the plaintiff, Miller, an easement or property right in the original right-of-way of the defendant company, then the defendant is about to take the plaintiff's property and it should be enjoined from doing so until it has acquired the property by condemnation proceedings or purchase from Mr. Miller. If the plaintiff, Miller, did not acquire an easement or property right by said contract, then he has an adequate remedy in damages for a breach of said contract and no injunction should be granted.

It should be remembered that this agreement, so far as this case is concerned, did not refer to the use to be made of the land conveyed by the deed containing the agreement, nor did it refer to the use to be made of any land of the grantor named in the deed; consequently no easement or right in the property conveyed was reserved, that is, no easement or property right was created by reservation. If the plaintiff, Miller, acquired an easement or right in the original right-of-way of the defendant which was not the subject of the conveyance he did so by virtue of an agreement, and the fact that the agreement is a part of the deed does not affect the question of the creation of such easement or right.

An easement or right in real property can be acquired by prescription, reservation in a deed, or by grant or agreement. That no such easement or right was created by prescription or reservation is apparent in this case; consequently the claim of plaintiff is based upon the agreement contained in said deed.

Did said agreement create an easement in the right-of-way of the defendant? The statute then and now in force (8620, General Code) provides that:

"No lease, estate or interest, either of freehold or term of years, or any uncertain interest of, in or out of lands, tenements or hereditaments, shall be assigned, or granted except by deed or note in writing, signed by the parties so assigning and granting the same."

The agreement in question was not signed by the railway company, and hence it did not convey to the plaintiff an easement or interest or property right in the right-of-way of the defendant (79 O. S., 124; 17 Supreme Court Rep., 147, last paragraph of opinion on page 154; see also as bearing somewhat on these principles 72 O. S., 272, and 79 O. S., 279).

I doubt very much whether this agreement was for land or an interest in land so that if it had been signed by the defendant it would have conveyed any interest in the land to Mr. Miller. (See on this phase of the case, 6 Ohio Circuit Decisions, page 43.) But if it was for an interest in land it was not executed so as to convey any interest in the right-of-way.

The language contained in the deed in question in this case amounted to simply an agreement by the defendant for a valuable consideration not to use a certain part of its property in a certain way and the remedy for a breach of such an agreement is a suit for damages, which appears to the court to be adequate.

It follows that plaintiff's petition, which seeks to enjoin a breach of said contract, should be dismissed. It is unnecessary to pass upon the claim of the defendant that said agreement is void for the reason that it is against public policy to permit a railway company to contract with an individual that it will not use its property to serve the public when the public demands such service.

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Note broker charged with collecting usurious interest is not subject to police surveillance and injunction lies against such surveillance. 472.

The proper procedure for compelling a transfer of corporate stock is by petition praying for a mandatory injunction; in such a case it is not necessary that the transfer agent be made a party. 86.

Injunction does not lie against the Tax Commission of Ohio to restrain certification to the Auditor of State of the gross intrastate earnings of a railway company, to be used as a basis for levying an excise tax against the said company. 93.

Will lie against additional servitude of property appropriated for park purposes without additional compensation; but does not lie against such change of use. 225.

Does not lie against the cremation by a widow of her husband's body, when. 619.

Where the evidence shows that no criminal procedure is invoked, that trespasses are continuous and in order to obtain a remedy at law a multiplicity of suits would

be necessary, there is no remedy at law against such trespasses and equity will intervene. 472.

Disregard by a railway company of an agreement with an abutting land owner as to the manner in which the right-of-way should be used, will not be enjoined, where the company finds it necessary to so disregard its agreement in order to properly discharge its duty to the public, but the owner of the land will be remanded to a suit for damages growing out of the breach. 683.

INSURANCE (Accident)—

The condition written into a policy of insurance against accident or injury, that "the actual payment of the respective premiums on the date when due or within seven days thereafter, whether the insured is entitled to indemnity or not," is a condition precedent to the renewal of the policy for another term against future injury, and not a condition precedent to the payment of indemnity by the company for injuries sustained after the payment of one premium and before the next premium fell due. 97.

Change of relation of insurer and insured to debtor and creditor. 97.

INTEREST—

Where a lessor upon tender thereof refuses to accept the amount of the privilege of purchase named in the lease, interest will not be allowed to him on said amount, and the purchaser will not be required to pay interest on the amount of his tender. 538.

INTERROGATORIES—

Dismissal for failure to answer interrogatories attached to answer of the defendant, and entry showing hearing on the merits with judgment of dismissal, may be vacated at a subsequent term of court. 269.

INTOXICATING LIQUORS—

Proceedings to prohibit the sale of intoxicating liquors in a residence district are judicial in character; procedure where such a proceeding is brought in a county where there are several common pleas judges. 449.

Where a petition, presented to a court or mayor, to prohibit the sale of liquor in a residence district, is found to be correct in form and properly filed, such fact must be accepted as *prima facie* evidence of its sufficiency, and the burden is upon the contestants to show that not all of the signers were qualified. 449.

Changes in population since the last regular municipal election can not be permitted to interfere with the provisions found in Section 6149. 449.

The petition need not be addressed to the mayor by name or to a particular judge of the common pleas court; but it is sufficient if it is filed with the mayor or a judge within three months of the signing thereto of the first names procured to the petition. 449.

The opening of a new saloon within the prescribed territory after the signatures to the petition were obtained, but before the hearing thereon, does not cause the map attached to the petition to be open to objection because it does not show the location of such saloon; but objection does lie to a map which does not show the location of all saloons within the prescribed district at the time the petition was sent out for signatures. 449.

A signer asking to have his name stricken from the petition on the ground of fraud or misrepresentation must establish such fact by a preponderance of the evidence, and testimony offered in that behalf will be closely scrutinized. 449.

JAIL—

The matron of a jail is not a public officer. 659.

JUDGE—

Uncertainty as to who is designated by the term "presiding judge." 13.

JUDGMENT—

A defendant is not entitled to a judgment of dismissal on the ground that plaintiff is in default for reply to answer. 269.

Vacation of, at a subsequent term, where given on the merits for failure to answer interrogatories. 269.

Lien of, without validity where the defendant was named by initials and not by his full Christian name. 605.

JUDICIAL POWER—

The conferring of authority to practice law is a judicial act. 273.

JUDICIAL SALES—

The rigor of former rulings with reference to a purchaser who fails to take have been relaxed, and fair dealing now prevents a court from holding a purchaser to be in contempt for failing to take property where a reasonable question exists as to the marketability of the title. 332.

The fact that the decree was prematurely entered in an action for partition, is sufficient ground for overruling a motion to punish the purchaser as for contempt in failing to take property. 332.

JURISDICTION—

The conferring of jurisdiction by reference. 59.

The jurisdiction of the Municipal Court of Cleveland is limited, in civil cases, to residents of said city and to such residents of the county outside of the city as are not householders or freeholders and are served with process when within the corporate limits. 59.

Of the mayor of a village which

lies in two counties is co-extensive with both counties. 390.

Where a village is situated in two counties, and an offense is committed in one county and the situs of the village is in the other where trial was had and judgment rendered, proceedings in error can only be had to the common pleas court of the county in which trial was had. 390.

The probate court is without jurisdiction to determine equities and set aside a deed in the process of settling an estate of a decedent; proper proceedings for ascertaining the rights of judgment creditors in the lands of a decedent. 19.

Where a will vests in a testamentary trustee discretion in the employment of a portion of the principal in maintaining the *cestui que trust*, the trustee is an officer of the probate court, and the common pleas is without jurisdiction in an original suit to determine whether some portion of the property should be sold or the price which should be received therefor. 141.

KNOWLEDGE—

Of involuntary or co-trustee of intention of acting trustee to misapply funds. 193.

LABOR—

The act prohibiting interference by an employer with his employe in joining a labor union is not in contravention with constitutional guaranties, but is a valid exercise of legislative power; motive in discharging an employe determines the quality of the act. 401.

The act relating to the preservation of the health of females employed in manufacturing, mechanical, mercantile and other establishments (102 O. L., 488), is justified on the ground of public health, morals and the general

welfare, and is valid and enforceable. 1.

LEASE—

A party can not claim to have been misled as to the terms of an unrecorded lease, where he made no search of the records for the lease, and no reliance was therefore placed on the fact that no lease appeared of record. 433.

A party occupying the middle portion of a building nowhere adjacent to the outer wall has notice, without consulting the lease, that the party occupying the intervening space adjacent to the outer wall has the exclusive right to the use of that wall for advertising purposes. 433.

Reformation of a lease will not be granted on the mere showing that some provision agreed to by the lessor and an agent of the lessee was not incorporated in the lease as subsequently executed by the lessee company. 433.

Specific performance as to a privilege of purchase where the interest in the privilege had been assigned and the property was sold to another than the assignee and the owner of the fee refused to accept the purchase price. 538.

LICENSE—

As to the regulation of pool rooms by license fees—see MUNICIPAL CORPORATIONS.

The act requiring money lenders, other than banks and building associations, to secure a license from the Secretary of State, is a valid enactment. 441.

LIEN—

Failure to sue by the full Christian name of a defendant defeats the lien on a transcript of the judgment obtained in such case, when. 605.

LIEN (Mechanic's)—

Where more than one building has been erected on different lots, it is not sufficient that but one mechanic's lien be filed for all the

buildings unless the lots upon which the buildings stand are contiguous. 78.

In an action to foreclose a mechanic's lien the petition should be definite as to whether the work was performed under a general contract, and also as to whether the lots upon which the building or buildings stand are contiguous. 78.

Where payment was made by an owner to a principal contractor before the work was completed and payment due under the terms of the contract, and such payment was not made to enable the principal contractor to complete the work, but was made solely for his accommodation, it is invalid as against sub-contractors and materialmen who subsequently completed their liens within the time required by law, and as to them the fund will be treated as still in the hands of the owner and the liens of sub-contractors and materialmen will attach thereto to the extent of their claims. 217.

LIFE ESTATE—

An outstanding life estate is a bar against partition, notwithstanding the life tenant consents thereto. 17.

LIMITATION OF ACTIONS—

An action by a surety for reimbursement on account of payment of the note of his principal when due is subject to the six years statute of limitations. 468.

Application of the statute where subrogation is not asked. 193.

Substitution of an assignee of the original party plaintiff, where not asked until the statute of limitations has run, does not avoid the bar by relating back and making the substituted party the plaintiff *ab initio*. 193.

Where the action is an attempt to recover from the defendant on an implied promise as co-trustee, the six years rather than the ten years statute is applicable. 193.

The ten years statute of limitations applies to an action for recovery from a probate judge of funds belonging to the probate court which were lost through the failure of the bank in which they were deposited. 171.

The statute does not begin to run in such a case until the end of the incumbency of the judge, notwithstanding he may have served one or more terms after the expiration of the term during which the shortage occurred. 171.

LIQUOR LAWS—

See INTOXICATING LIQUORS.

LYNCHING—

See MOR.

As to admission to bail of one charged with participating in a lynching. 395.

MANDAMUS—

Is the proper remedy for reinstatement in office of one wrongfully ejected therefrom and to compel the issuance of a certificate for salary due and unpaid. 659.

Will lie to compel a county auditor to act as the recording officer of a court house commission. 577.

When mandamus lies to require county commissioners to participate in the proceedings of a court house building commission. 577.

Mandamus lies to compel public officials to perform duties required by law only by a public officer whose duty it is to enforce the performance of official duty, or by others having a direct beneficial interest, or where the public injury will be serious if the duty be not performed, or where a public official refuses to bring such proceeding. 590.

Will not lie to compel publication of the rates of taxation by a county treasurer, where the relator is a publisher who has no contract for making such a publication. 590.

MAP—

Attached to a petition to prohibit the sale of intoxicating liquors in a residence district; must show the location of all the saloons within the prescribed territory at the time the petition was sent out for signatures. 449.

MASTER AND SERVANT—

As to liability for the death of a workman who was knocked from a wall which was being removed by an independent contractor. 7.

MAYOR—

The jurisdiction of a mayor of a village lying in two counties is co-extensive with both counties, but error can only be prosecuted to the common pleas court of the county in which trial is had. 390.

MERIT SYSTEM—

See CIVIL SERVICE.

As to the raising or lowering of salaries of policemen and firemen appointed under the merit system. 369.

MILITIA—

An application for a writ of habeas corpus will be denied when it appears that the person restrained is amenable to the jurisdiction of a military court. 566.

The act of Congress "to promote the efficiency of the militia" has increased the authority of the United States over the organized militia of the various states and decreased the authority of the states, but has not otherwise changed the individual status of soldiers of the organized militia. 566.

A member of the militia in custody for failure to obey order to report for inspection will not be released on habeas corpus. 566.

MINES AND MINING—

The acceptance and collection of a voucher in full of royalties due under a coal mining lease, where embodying an unequivocal offer to

settle for the amount named therein, which is the amount named in the lease with a deduction on account of unavoidable casualties provided for in the lease, amounts to an accord and satisfaction of the claim. 641.

MINISTERIAL ACTS—

The keeping of the streets and sidewalks free from obstructions is a ministerial duty; sufficient allegations as to neglect of such duty resulting in injury to plaintiff. 183.

MISTAKE—

Facts which may be considered under a petition for reformation of a building contract. 33.

What constitutes a mutual mistake; an agreement will not be varied on account of a mutual mistake, unless; limitation on parol evidence to vary a written instrument. 55.

MOB—

See Riot.

The statutory provision for recovery of damages by persons who have suffered at the hands of a mob is limited to injuries, whether fatal or otherwise suffered at the hands of a mob attempting to lynch another; injuries resulting from violence by a mob having no intention or purpose to lynch are not included. 673.

No legal responsibility attaches to a county for injuries resulting from the violence of a mob acting within the limits of a municipality, until such a degree of disorder develops that the mayor becomes satisfied he can no longer cope with the situation and calls upon the sheriff to aid in the suppression of said violence. 673.

The phrase "assaulted and lynched," as used in Section 6281, can not be read assaulted or lynched, in an action to recover damages caused by a mob. 673.

The phrase "correctional power," as used in the statutes relat-

ing to mobs, applies only to acts of violence by a mob against one apprehended for committing a crime, and does not apply to efforts to intimidate strike breakers. 673.

MONEY LENDERS—

Validity of the act requiring money lenders to secure licenses. 443.

MOTIVE—

Of public officials in requiring that a license fee of \$15 shall be paid on each pool table, maintained in a pool room within the municipal limits, will not be declared invalid on the theory that it was passed with the intention of making the fee prohibitive. 105.

MOTOR VEHICLES—

Whether an automobile is a dangerous agency is a question of law and not of fact; it is not to be classed with dynamite or like dangerous instrumentalities, and is therefore not a dangerous agency within the meaning of 47 Ohio St., 387, nor can such dangerous agency be inferred from the act regulating its use. 145.

The owner of an automobile is not liable in damages for the negligent acts of his chauffeur while the latter is acting beyond the scope of his employment 145.

There is no civil protection to the public against irresponsible, reckless, joy-riding chauffeurs. 145.

MUNICIPAL CORPORATIONS—

A municipality appropriating land for park purposes does not obtain the fee, when; the interest which was really obtained by such a proceeding is determined by statute and not by the compensation awarded. 225.

Only property held in fee can be sold or leased by a municipality; additional servitude without additional compensation may be enjoined. 225.

Injunction does not lie to prevent a municipality from condemning land in which it has an easement only but desires to obtain the fee; the necessity for obtaining the fee of such lands is wholly within the discretion of council. 225.

Use of property for park and for wharf purposes distinguished; riparian ownership and government interest distinguished. 225.

An ordinance regulating pool rooms, which places a license fee of \$15 on each pool table maintained within a pool room within the corporate limits, will not be held invalid on the theory that it is a tax for revenue purposes, or for the reason that it has been levied for the purpose of prohibiting pool rooms altogether. 105.

Construction of the franchise to the Cincinnati Street Railway Company with reference to the liability of said company to a franchise tax on the earnings of interurban companies entering the city over tracks covered by said franchise. 305.

Doubts as to the validity of an ordinance providing for the deposit of public funds in certain banks as legal depositories will be resolved in favor of a treasurer objecting to compliance therewith, where the ordinance was not published for fifteen days, or the advertisement for bids was not made for two weeks, or less than twenty-nine days elapsed between the passing of the ordinance and the award. 681.

Grade crossings and informalities in proceedings for their abolishment. 483.

Ordinances creating police and fire departments for a village which has been advanced to the grade of a city are ordinances providing for the expenditure of money, and are therefore subject to the referendum provisions of the Crosser act, and do not be-

come effective for sixty days after passage. 513.

A permit can not be refused for the erection of a building to which no objection lies except its contemplated use; where the application is for a building of a lawful character the duty of the building commissioner is purely ministerial and is mandatory. 523.

Section 452 of the codified ordinances of Cincinnati, prohibiting the erection of a blacksmith shop within a square in which two-thirds of the buildings are used as residences, unless consent thereto is given in writing by two-thirds of all the property within the square, applies to the use to which the building is to be devoted, and the word "erected" will be construed as applying to the putting in place of the appliances necessary for carrying on the work of blacksmithing. 523.

Policemen and firemen do not hold their positions for a fixed and definite term, and hence are not subject to the provisions of Section 4213, G. C., which forbids increase or diminishing of salaries of officers, clerks or employees of municipalities during the term for which they were appointed or elected. 369.

Council has power to increase or diminish salaries of policemen or firemen after appointment. 419.

The tendency of city councils in fixing salaries is generally fair both to officers and the public. 419.

A municipal council has authority to pass an ordinance providing what number of police shall be employed, their salaries, etc., and repealing the former ordinance under which the department was operated. Such action would result in all members of the department losing their positions as of the date of the repealing ordinance, and such a method of removal is not in contravention of

Section 4484, which refers only to individual removals for cause. Thereafter reappointments may be made under such terms as council has provided. 369.

Power of municipalities with reference to the collection and disposal of garbage and other refuse matter; limitations as to articles which may be thus classed; impairment of contract obligations with reference to the collection of offal of a sanitary character. 321.

Section 3806, requiring that before any contract involving the expenditure of money is entered in a certificate be filed that the money necessary is in the treasury and unappropriated, is primarily applicable to expenditures derived from the general revenue; such a certificate is not necessary where a specific power is conferred upon a municipality for a specific purpose with a specific provision for payment of the expenditure involved in the exercise of such power. 633.

A German newspaper is qualified to publish ordinances, when; *bona fide* circulation; nationality of subscribers. 636.

MUNICIPAL COURT—

The jurisdiction of the Municipal Court of Cleveland is limited, in civil cases, to residents of said city and to such residents of the county outside of the city as are not householders or freeholders and are served with process when within the corporate limits. 59.

NAME—

The naming of a defendant by his initials instead of his full Christian name defeats a lien on the transcript of the judgment obtained in such action, when. 605.

NECESSARIES—

Sufficiency of affidavit for attachment on a claim for necessities where directed against more than ten per cent. of the per-

sonal earnings of the defendant for services rendered within three months. 518.

NEGLIGENCE—

Application of the doctrine of the last chance. 543.

As to acts which were willful and acts which were negligent. 543.

The owner of an automobile is not liable for the negligent acts of his chauffeur while the latter is acting beyond the scope of his employment. 145.

Where money on deposit in a bank has been paid to the wrong person, the question whether the bank is relieved from liability on the ground that it exercised reasonable care is one for the jury. 159.

The defenses of general denial and contributory negligence may be combined in the same answer. 45.

Where a passenger on an electric car, fearing a collision with a railway train, jumped and was fatally injured; proximate cause; next of kin. 481.

A court can not apportion negligence as between persons or agencies either in degree or as to time, but must accept the finding of the jury in that behalf where based upon the evidence and circumstances of the case. 481.

Where a woman was struck at a railway crossing on a foggy night by a locomotive which gave no signal of its approach. 49.

Where no whistle is sounded or bell rung at a railway crossing, a presumption arises that no train is approaching. 49.

Whether the work of taking down a wall, ruined by fire, was inherently dangerous was a question for the jury; such a case can not be arrested from the jury on the ground that the accident was the result of the negligence of an independent contractor; a workman at work on such a wall can

not be said to have assumed the risk of a defective derrick, when. 7.

NEWSPAPER—

Qualification of a German newspaper for the publication of ordinances. 636.

The term "paid circulation" is used in Section 4228, G. C., in contradistinction from gratuitous circulation, and does not mean that payment has been made in advance, but that each subscriber is under obligations to pay for the paper and does not receive it as a gratuity. 636.

It is not necessary that a newspaper printed in the German language, which qualifies to publish ordinances, should have its entire circulation among persons who are able to read German. 636.

NEW TRIAL—

Failure of a petition in an action for wrongful death to disclose all next of kin is not ground for a motion for a new trial by the defendant. 481.

NEXT OF KIN—

See NEW TRIAL.

NOTARY PUBLIC—

A notary public, appointed and qualified under the laws of Ohio, has no authority to punish a witness for contempt in refusing to testify before him in the taking of a deposition pursuant to a commission issued to such notary by a court of another state wherein the action in which said deposition is to be used is pending. 161.

NOTICE—

A tenant occupying the middle portion of a building has notice, without consulting the lease, that the party occupying the space next to the wall has the exclusive right to use the wall for advertising purposes. 433.

Must be pleaded in an action on a contract of indemnity which stipulates how notice of default

shall be brought home to the surety. 158.

NUISANCE—

Public control with reference to the elimination of nuisances is the same over toll roads as over other highways. 129.

OFFAL—

See GARRAGE.

OFFICE AND OFFICER—

An action in mandamus to compel a public officer to take steps required by law will not lie unless instituted by a public officer whose duty it is to enforce the performance of official duty by other officers. 59.

The term "livery hire," incurred by a sheriff in the proper performance of the duties of his office, includes "automobile hire." 61.

By whom mandamus proceedings may be maintained to compel public officials to perform their duties. 590.

Fees and mileage illegally paid to a coroner may be recovered in an action brought by the prosecuting attorney; the fact that the money so paid was in compromise of a larger sum claimed by him as salary under an unconstitutional law does not bar such an action; the rule as to voluntary payment does not apply in the case of one public officer dealing with another with reference to their compensation. 41.

One wrongfully ejected from office may by mandamus compel reinstatement and payment of salary due. 659.

A woman serving as the matron of a jail is not a public officer, and could not become a public officer under our present Constitution; she is a mere assistant of the sheriff and her term of office expires with his, and she can thereafter have no claim upon the of-

fice except by reappointment by the incoming sheriff. 659.

Policemen and firemen do not hold their positions for a fixed and definite term and are therefore not subject to the provision of Section 4213, as to change in salary during term of appointment. 369.

Policemen and firemen are not appointed for a "term." 419.

Where funds of the probate court are lost through a bank failure, the judge holding office at the time becomes liable therefor, and where the amount of the shortage is carried on the books as cash, succeeding judges who assume the fictitious account also become liable therefor. 171.

An action for recovery of such a shortage is subject to the ten years statute of limitations, and time does not begin to run until the end of the incumbency of the judge who was in office at the time the shortage occurred, notwithstanding he may have served one or more terms after the term at which the shortage occurred. 171.

ORDINANCE—

Regulating pool rooms—see MUNICIPAL CORPORATIONS.

As to publication of ordinances in a German newspaper—see MUNICIPAL CORPORATIONS.

For the elimination of grade crossings; failure to name certain streets upon which dangerous crossings exist may be cured by a supplemental ordinance. 483.

Presumption as to a valid legislative intent. 523.

Where an ordinance deals with streets and the public landing it deals with two subjects and is invalid on that ground. 65.

An ordinance is invalid if not based upon an exercise of discretion on the part of council as to terms and conditions, where the ordinance grants the right to a

railway company to appropriate an easement across a public landing. 65.

PARTIES—

In a proceeding to compel a corporation to transfer corporate stock, it is not necessary that the transfer agent be made a party. 86.

Vendors are proper parties to an action by a principal to obtain possession of property which the agent purchased for the principal but afterward denied the agency. 177.

PARTITION—

The right to immediate possession is essential to the right to partition, and a remainderman is not entitled to partition notwithstanding the owner of the intermediate estate consents thereto. 17.

Where property is purchased at a sale in partition by a tenant in common, that part of the title which was cast by the law of descent upon the said purchaser is extinguished, and the whole title vests in him by purchase. 650.

PARTNERSHIP—

Deed conveying property belonging to a partnership held to create an express trust, where the purpose of the conveyance was to liquidate partnership liabilities; action by administrator of deceased partner for an accounting. 609.

PAYMENT—

The rule that money voluntarily paid can not be recovered does not apply to the case of one public officer dealing with another with reference to their compensation. 41.

PERSONAL RIGHTS—

Violation of, by interfering with an employee desiring to join a labor organization. 401.

PLEADING—

An allegation that a municipality permitted a contractor to erect barriers or obstructions upon its streets or sidewalks, which were not marked by danger lights at night, and because of such negligence the plaintiff was injured, is good against demurrer. 183.

In an action to foreclose a mechanic's lien the petition should be definite as to whether the work was performed under a general contract, and also as to whether the lots upon which the building or buildings stand are contiguous. 78.

In an action for damages on account of a dog bite, it is not necessary to allege that the dog was known to its owner to be vicious, or that it was in fact vicious. 80.

Necessary averments in an action on a contract of indemnity which stipulates how notice shall be brought home to the defendant surety. 158.

The fact that the petition in an action for damages on account of wrongful death does not disclose all of the next of kin, does not afford ground for a motion for a new trial by the defendant. 481.

The rule that an action must be founded upon a definite theory which can not thereafter be changed or departed from, does not permit a plaintiff in a suit on an express contract to prosecute his action as for breach of an implied contract. 429.

Where a plaintiff alleges that the wrongful act of which he complains was both willful and negligent, a motion to require him to elect upon which he will rely will be granted; not that willfulness is always incompatible with negligence, but for the reason that the plaintiff's petition should contain allegations which affirmatively and unconditionally—and not alternatively—preclude his own negligence as a directly contributing cause of the injury. 543.

While a general denial is inconsistent with the defense of contributory negligence, it is permissible to combine them in the same answer and rely upon the developments of the trial to disclose which is the true defense. 45.

POLICE DEPARTMENT—

See MUNICIPAL CORPORATIONS.

POLICE POWER—

Injunction lies against surveillance over a note broker who is charged with collecting usurious interest. 472.

The provision of Section 1012, G. C., prohibiting the use of cellars or basements for bakeries, is a reasonable exercise of the police power of the state. 545.

PRESIDING JUDGE—

Uncertain meaning of the term. 13.

PRESUMPTION—

Where no whistle is sounded or bell rung at a railway crossing a presumption arises that no train is approaching. 49.

On application for bail by one charged with murder in the first degree, the presumption is against granting the application. 395.

PRIVATE RIGHTS—

The right of freedom of contract in the sale and purchase of labor is not invaded by the provisions of the act for the preservation of the health of female operatives. 1.

PROMISSORY NOTES—

An action lies in favor of a surety who has paid the promissory note of his principal when due; when such a note is not in judgment and is independent of any security, lien or preference, the action is barred in six years. 468.

PROXIMATE CAUSE—

Where a passenger on an electric car, fearing a collision with a

railway train, jumped and was fatally injured in so doing. 481.

PUBLIC FUNDS—

Authority of county commissioners and auditor to replenish exhausted funds by transfer from other funds must be strictly construed; moneys so transferred ordered restored; but funds arising from fees paid into county offices may be so transferred. 337.

PUBLIC LANDING—

As to the right of a railway company to appropriate an easement across a public landing for an elevated railway track. 65.

PUBLIC POLICY—

Where public rights are involved; discriminating provision in a contract between neighboring telephone companies. 289.

PUBLICATION—

Of the rates of taxation by a county treasurer can not be compelled by a publisher who has no contract to make such publication. 590.

The competency of a newspaper to make a publication required by law depends upon the purpose of its publication rather than the extent of its circulation in a given community. 529.

Competency of a German newspaper to publish the annual report of county commissioners. 529.

RAILWAYS—

Authority to appropriate an easement across a public landing for an elevated railway is granted by Section 3283a, Revised Statutes, but in making such an appropriation it is necessary to follow the procedure laid down in Title II, Chapter 8, Part 3, Revised Statutes. 65.

An ordinance granting a railway the right to condemn such an

easement is void, if not based upon an agreement between the railway company and the municipality wherein the discretion of council has been exercised as to the terms and conditions under which the grant is made. 65.

Whether the rule that as between a railway and navigable river the use of ground for purposes of navigation is paramount to its use for railway purposes, is applicable to the terminals required for these respective means of transportation, *quære*. 65.

Right to encroach upon a highway with the supports of an overhead bridge can not be acquired by adverse possession. 129.

The proceeds from an issue of municipal bonds, authorized for the purpose of abolishing grade crossings, may be applied so far as necessary to the elimination of crossings of streets not specifically named in the original ordinance, when. 483.

A general plan for the elimination of dangerous grade crossings includes within its scope authority to remove a tunnel under a railway embankment and to substitute therefor a bridge which will span the street and will afford greater facilities and increased safety for travel passing thereunder. 483.

The provision of Sections 8876 and 8877, requiring the preparation of plans within a limited period after the passage of an ordinance for the elimination of dangerous crossings, is directory and not mandatory, and is a provision which may be waived for the purpose of giving time for preparing plans, etc. 483.

The certificate of the city auditor that the money necessary to meet the city's share of the expense is not necessary in matters relating to grade crossings. 633.

An agreement for the use of a

right-of-way ripens into title thereto, where in accordance with such agreement the road has been constructed along such right-of-way and is being operated thereon. 683.

A railway company which has agreed for a valuable consideration not to locate its track in a certain manner on its right-of-way, but subsequently finds it necessary to disregard this agreement in order to properly discharge its duty to the public, will not be enjoined against a breach of its agreement but the owner of the land will be remanded to a suit for damages growing out of the breach. 683.

RECEIVERS—

A receiver is not liable for the infringement of a trade name, in the prosecution of the business which has been placed in his hands, when; method of taking an account of profits under an alleged infringement, with determination of expense, losses, etc.; sales which can not be included in an accounting of profits. 113.

Ground for a receiver of a corporation is not shown where there is no prayer for legal or equitable relief, and especially if the purpose appears to be merely to stave off creditors by preventing them from realizing on their claims through suits at law. 206.

RECORDS—

Right of the public to inspect public documents. 319.

The proceedings of the Tax Commission of Ohio constitute a public record, and subject to proper regulations this record is open to inspection by any and all persons who choose to examine it, regardless of their interest or lack of interest in the subject-matter. 219.

REFERENDUM—

Ordinances creating police and fire departments for a village which has been advanced to the

grade of a city are subject to referendum. 513.

REFORMATION—

The rule that a written obligation can be reformed only on clear and convincing evidence is satisfied in the case of a building contract, when; what facts may be considered in determining such a case. 33.

Of a lease will not be granted on a mere showing that some provision which was agreed upon between the lessor and an agent of the lessee was not incorporated into the lease subsequently drawn by the lessor and executed by officers of the lessee company. 433.

REMAINDER—

Acceleration of, by the refusal of a widow to take under the will of her husband. 506.

A devise of a contingent remainder is not liable for the collateral inheritance tax. 657.

REMAINDERMAN—

A remainderman is not entitled to partition notwithstanding the owner of the intermediate estate consents thereto. 17.

REMITTITUR—

A court is disinclined to grant a remittitur for the reason that it inures, as a rule, to the benefit of the defendant and militates against the plaintiff without any certainty that it will terminate the action. 7.

RIOT—

One charged with murder in the first degree through participation in a riot is not entitled to bail where his defense is an alibi. 395.

RIPARIAN RIGHTS—

Riparian ownership and government interest distinguished. 225.

The title of the state and of municipalities to land under the waters of Lake Erie is not that of proprietor, but it is held in trust by them for public purposes

of navigation and fishery; riparian ownership embraces all facilities and instrumentalities which further navigation and fishing, and includes access to navigable water and the right to wharf out to it. 225.

The fact that a municipality has used public funds for piling and filling in lands for park purposes does not defeat the rights of reversionary riparian owners in such lands. 225.

ROADS—

County commissioners may at their discretion meet the expense of constructing and repairing county roads by a levy in excess of the limitation fixed by the taxing statute. 52.

Encroachment upon a highway by supports for an overhead railway bridge; right to so encroach can not be acquired by adverse possession; public control over toll roads with reference to nuisances is the same as over other highways; method of establishing the width of a highway where the records have been destroyed. 129.

SALARY—

Council has power to diminish or increase the salaries of policemen and firemen after their appointment. 419.

SECRET SERVICE OFFICER—

The provision for the appointment of a secret service officer, found in Section 2915-1, General Code, is inoperative and void for the reason that it is impossible to determine what judge or officer is designated to fix the compensation; repealed Section 1541 is therefore still in force. 13.

SERVICES—

See EMPLOYER AND EMPLOYEE.

Compensation for, to an attorney employed under an express contract, where the duties to be performed were subsequently increased by legislation. 353.

SHERIFF—

Allowances to, by the county commissioners, may include automobile hire incurred in the necessary and proper administration of the duties of his office. 61.

SIDEWALKS—

The duty devolving upon a village to keep its streets and sidewalks free from obstruction is a ministerial duty. 183.

A petition charging that a contractor, with knowledge of the village, erected barriers upon a sidewalk, which were not marked by danger lights at night, and by reason of such negligence the plaintiff suffered an injury, is good against demurrer. 183.

SIGNS—

Right of lessees to place signs on the outer wall of the building occupied; tenant located next to outer wall has exclusive right to use of wall for advertising purposes, when. 433.

SOCIETY FOR PREVENTION OF CRUELTY—

The provisions of the Ohio statutes, so far as not in conflict with the federal twenty-eight hour live stock shipment law, are constitutional, and the discretion of officers of the society in determining what constitutes cruelty will not be interfered with, when. 625.

SODOMY—

The head is a part of the body and the mouth is an "opening of the body" within the meaning of the statute relating to sodomy. 349.

SPECIFIC PERFORMANCE—

A lessor who refused upon tender thereof, to accept the amount named in a lease with privilege of purchase, will not be allowed interest on said amount, and the purchaser standing ready to take the land at the price so named will not be required to pay interest on the amount of his tender. 538.

Specific performance, where interest in a privilege of purchase was assigned and the property was sold to another than the assignee and the owner of the fee, into whose lease the privilege of purchase was incorporated, refused to accept the purchase price. 538.

STATUTES—

When a statute which has received a settled judicial construction is repealed and is afterward re-enacted in the same terms and for the same purpose and object, it will be presumed that the legislative body so re-enacting it intended that it should bear the same construction which was given to the original, unless a different intention is shown. 364.

STATUTES CONSIDERED—

[Where not otherwise stated the reference is to the General Code.]

Section 154, (repealed), held to be still in force. 13.

Section 327, relating to the lending to depositaries of money belonging to the state, the giving of bond, etc. 185.

Section 1012, relating to ventilation of bakeries. 298.

Section 2296, providing how and by whom public funds may be transferred. 337.

Section 2342, relating to county building commission. 577.

Section 2409, relating to appointment of a clerk for the county commissioners. 577.

Section 2443, relating to disposition by county commissioners of unexpended balances. 337.

Section 2508, providing for publication of the annual report of the county commissioners in a newspaper published in the German language. 529.

Section 2571, providing proceedings when a public fund has become exhausted. 337.

Section 2866, relating to the fees of coroners. 41.

Section 2915-1, relating to the appointment by the prosecuting attorney of a secret service officer. 13.

Section 2921, relating to the duty of the prosecuting attorney to procure a restraining order against misapplication of public funds. 41.

Sections 3283 and 3283a, Revised Statutes, providing how a railway company may appropriate a road or street. 65.

Section 3539, relating to jurisdiction of officers of a municipality situated in two counties. 390.

Section 3677, relating to the powers of a municipality to appropriate property. 225.

Section 3681, relating to the application to be made to court for appropriation of lands. 225.

Section 3698, relating to the lease or sale of property belonging to a municipality. 225.

Section 3812, providing methods for computing special assessments. 364.

Section 4212-2, Revised Statutes, making the owner or harbourer of a dog liable for damages caused by it. 80.

Section 4213, providing that the salary of no officer, clerk or employe of a municipality shall be increased or diminished during the term for which he was elected or appointed. 369 and 419.

Section 4227-1-2-3, known as the municipal initiative and referendum law. 513.

Section 4227, relating to the authentication and recording of ordinances and providing when they shall take effect. 681.

Section 4228, relating to the publication of ordinances and resolutions. 636.

Section 4232, relating to publication of ordinances in municipal corporations in which no newspaper is published. 681.

Section 4233, providing what

the effect of failure to publish ordinances, etc., shall be. 681.

Section 4484, relating to dismissal of municipal employees. 369.

Section 5331, known as the collateral inheritance tax law. 657.

Section 5649-3a, fixing a maximum tax rate. 120.

Section 5654, relating to transfers of surplus from special taxes or loans. 337.

Section 5699, providing that taxes collected under a special levy shall be used for the purpose designated. 337.

Section 6140, providing for the filing of a petition to prohibit the liquor traffic in a residence district. 449.

Section 6141, providing that the certificate or decision of mayor or judge in a local option case shall be evidence. 449.

Section 6149, relating to signatures to a petition prohibiting the liquor traffic in a residence district. 449.

Section 6253, relating to publication of the rate of taxation in a German newspaper. 590.

Section 6278, defining the words "mob" and "lynching." 673.

Section 6283, providing a remedy on account of death or injuries inflicted by a mob trying to lynch another. 673.

Section 6415, providing when an appropriation of property may be made. 65.

Section 7515, having reference to county roads whose records have been destroyed. 129.

Section 8308, Revised Statutes, relating to mechanic's liens. 78.

Section 8335, relating to the effect of collusion or fraud in payment to principal contractor. 217.

Section 8673, providing for a record of certificates of corporate stock. 86.

Section 8876, relating to the preparation of plans for grade crossings. 483.

Section 8877, providing when the common pleas court is to determine the manner of a grade crossing improvement. 483.

Section 9235, having reference to the width and grade of highways and plank roads. 129.

Section 10062, relating to the Ohio Humane Society. 625.

Section 10213, relating to the interpretation of words. 673.

Section 10382, relating to appeal. 111.

Section 10561, relating to the subsequent birth of a child of the testator. 593.

Section 10704, providing how corporate stock may be sold. 86.

Section 10969, providing that a guardian may borrow money and mortgage the estate of his ward in certain cases. 311.

Section 10972, relating to proceedings for authority to a guardian to borrow money on the property of his ward. 311.

Section 11219, relating to actions for recovery of real estate. 129.

Section 11220, relating to recovery of real estate dedicated to public use. 129.

Section 11222, relating to contracts not in writing. 193.

Section 11222, providing that an action on a contract not in writing must be brought within six years. 468.

Section 11226, known as the statute of limitations applicable to official bonds. 171.

Section 11227, providing for a limitation for the bringing of certain actions. 193.

Section 11261, providing for a continuance of an action upon disability of one of the parties. 193.

Section 11350, providing how answers to interrogatories may be enforced. 269.

Section 11614, providing when a plaintiff may be required to give security for costs. 362.

Section 11620, providing when judgment may be entered against a surety for costs. 362.

Section 11631, providing when common pleas or circuit court may vacate or modify its orders or judgments after term. 269.

Section 11894, relating to the appointment of a receiver. 206.

Section 12029, providing for the granting of an order of partition. 17.

Section 12241, relating to jurisdiction of the common pleas court over an order made by the probate court. 111.

Section 12943, prohibiting interference with an employe joining a labor organization. 401.

Section 13043, relating to sodomy. 349.

Section 10225, relating to jurisdiction of justices of the peace over non-residents. 59.

101 O. L., 134, relating to computation of assessments against corner lots. 364.

101 O. L., 399, relative to the Tax Commission of Ohio. 93.

102 O. L., 93, relating to additional allowances to sheriff. 61.

102 O. L., 266, fixing a maximum for tax levies. 52.

102 O. L., 488, relating to preservation of the health of female employes. 1.

102 O. L., 84, conferring upon Charles A. Thatcher the right to practice law. 273.

102 O. L., 469, requiring money lenders to secure licenses. 441.

STREETS—

Vacation of a street in part and the filling of it up with a railway embankment does not entitle an abutting owner to damages, when. 81.

Rule of the Haviland case for assessing corner lots restored by 101 O. L., 134. 364.

STREET RAILWAYS—

Under the franchise granted to

the Cincinnati Street Railway Company on August 18, 1896, the percentage of earnings to be paid to the municipality includes the earnings of interurban companies entering the city over tracks of the Cincinnati Street Railway Company covered by the said franchise. 306.

It is a ministerial duty on the part of a municipality to keep its streets free from obstruction; sufficient allegations as to negligence of that character to stand against demurrer. 183.

STRIKES—

A labor union strike, where the purpose is to settle a trade dispute or some other question growing out of and incidental to the relations between the strikers themselves and their employer, and the conduct of the strikers is free from force, intimidation or false representations, and is intended to better the condition of the strikers rather than to punish their employer, is a lawful undertaking notwithstanding the strikers may know that their collective action will result in damage to their employer. 257.

Circumstances warranting workmen from collectively leaving their employment; peaceable persuasion justified, whether directed against other workmen likely to enter their employer's service or against customers of their employer; but threats and intimidation are subject to injunction. 257.

The action of strikers and strike sympathizers in attempting to intimidate or drive out strike breakers is not the action of a mob within the meaning of the statute providing for the recovery of damages by one suffering injuries thereby. 673.

SUBROGATION—

Where a purchaser without knowledge was met by an alleged incumbrance in the form of a lien on a judgment procured in an action in which the vendor of the

property purchased was named as defendant by initials only. 605.

SUBSTITUTION—

Of an assignee of the original party plaintiff, where the bar of the statute has fallen, does not avoid the statute by making the substituted party the plaintiff *ab initio*. 193.

SURETIES—

A surety who pays the promissory note of his principal when due has a cause of action against him for reimbursement; such an action rests upon the implied promise of the principal to save him harmless in the premises, and is barred in six years by Section 11222, when. 468.

Sureties for state deposits are not liable for money secretly deposited. 185.

As to liability of, for state funds deposited in bank; knowledge of the acts of its own officers is chargeable to a state in dealing with sureties; provisions of the depository act which do not affect sureties. 185.

No renewal is necessary of a bond given to secure repayment of moneys belonging to the state, which have been loaned to a bank under the depository act. 185.

Connivance between principal and the officer giving the bond releases the surety. 185.

TAXATION—

Construction of the emergency section of the Smith one per cent. taxing statute. 52.

The expense of constructing, repairing and maintaining county roads may be met by county commissioners in their discretion by a levy in excess of the limitation fixed by the general taxing statute. 52.

Injunction does not lie to restrain the Ohio Tax Commission from certifying to the Auditor of

State the gross intrastate earnings of a railway company, to be used as a basis for levying an excise tax against said company. 93.

In such a case appeal lies against a violation of constitutional rights in the matter of taxation. 93.

Such an action would be directed against the Secretary of State to restrain cancellation of the plaintiff's articles of incorporation for refusing payment of the taxes assessed; or against the State Treasurer for recovery of taxes illegally paid. 93.

An ordinance regulating pool rooms by placing a license fee of \$15 on each pool table maintained in a pool room within the municipal limits, is not invalid on the theory that it is a tax for revenue purposes. 105.

Limitations on the power to levy taxes become unconstitutional, when. 120.

Mandamus will not lie to compel the placing on the tax duplicate of a budget as originally fixed and thereafter reduced by the tax commission, when. 120.

The discretion of the Ohio Tax Commission will not be interfered with by the courts, when. 120.

As to taxes received from special levies; transfer of surplus; replenishing of exhausted funds. 337.

The words "gross receipts," as used in the act providing for the collection from public utility corporations of an excise tax and penalties, embraces only such receipts as are the property of the corporation making the payment, and do not include that part of the proceeds from a joint enterprise which have been collected and are still in hand but which belong to another. 570.

Mandamus does not lie to compel a county treasurer to publish the rates of taxation where the application is made by a publisher

having no contract to make such publication. 590.

A devise of a contingent remainder is not liable for a collateral inheritance tax. 657.

TAX COMMISSION—

It is the right of any and all persons desiring so to do, to inspect the records of the Ohio Tax Commission, regardless of their interest or lack of interest in the subject-matter. 319.

TAX-PAYER—

Where two telephone companies combine to jointly serve the subscribers of both companies, equity will not enforce a contract which provides for any discrimination of service among those similarly situated. 289.

An agreement between two companies that neither will operate in the territory of the other, or connect with the competitors of the other, is against the public policy of the state, and a court of equity will not enforce such a contract unless the illegal part can be eliminated; and if it appear that the contract would not have been entered into had the objectionable provisions been omitted, it is apparent the consideration was to that extent unlawful and the contract can not be enforced in any part. 289.

TENURE—

Of office of policemen and firemen. 369 and 419.

TERMINALS—

As to whether the rule of law with reference to the paramount right to the use of land as between a railway and a navigable river is applicable to the terminals of these respective means of transportation. 65.

TIME—

A petition to prohibit the sale of intoxicating liquors in a residence district must be filed with

the mayor or judge within three months of the signing thereto of the first names procured; hearing delayed more than forty days; statute directory and not mandatory. 449.

TITLE—

The fact that the title to property sold at judicial sale is found to be unmerchantable is a sufficient ground for overruling a motion to hold the purchaser in contempt for failure to take. 332.

Is in a *bona fide* purchaser without knowledge, as against the holder of a lien on a judgment secured in an action wherein the defendant was named by his initials instead of his full Christian name. 605.

Where property is purchased at a sale in partition by a tenant in common, that part of the title which was cast by the law of descent upon the said purchaser is extinguished, and the whole title vests in him by purchase. 650.

An agreement for the use of a right-of-way by a railroad ripens into title thereto through the building and operation of the road. 683.

TRADE NAMES—

A receiver can not be held liable for the infringement of a trade name, when; sales which can not be included in an accounting for profits; method of accounting for profits of an alleged infringement, with determination of expenses, losses, etc. 113.

TRIAL—

As to arrest of a case from the jury, where there were questions of inherent danger in the removal of the wall as undertaken, and also as to the negligence of an independent contractor. 7.

The question whether a bank which has paid money on deposit to the wrong person is relieved from liability on the ground that

it acted with reasonable care is one for the jury. 159.

TRUSTS—

Where discretion is vested in a testamentary trustee as to employing a portion of the principal in maintaining the *cestui que trust*, jurisdiction to determine whether the welfare of the ward requires the sale of some portion of the property and the price which should be received therefor is exclusive in the probate court. 141.

Rights of a principal under a contract of purchase made by an agent. 177.

Knowledge of an involuntary or co-trustee of intention of acting trustee to misapply funds. 193.

USAGE OF EQUITY—

Can not ripen from local practice. 206.

USURY—

The collection of usurious interest by a note broker does not subject him to police surveillance. 472.

VERDICT—

A verdict assessing damages on account of the death of a woman at a railway crossing on a foggy night is sustained from the evidence that no signal of the approach of the locomotive was given and the engineer did not see the woman or know that she was struck until the next day. 49.

VILLAGE—

Duty of, with reference to keeping streets and sidewalks free from obstructions. 183.

WAIVER—

The statutory limitation in the time within which plans may be prepared by a municipality for

the elimination of grade crossings may be waived. 483.

WATER AND WATER-COURSES

The title of the state and of municipalities to land under the waters of Lake Erie is not that of a proprietor, but is held in trust by them for public purposes of navigation and fishery; riparian ownership and government interest distinguished; reversionary interest of riparian owners in submerged land which has been piled and filled in by a municipality. 225.

Wharf use of land, with the exclusive right to place piers, railway tracks, a passenger station and freight warehouses upon it, is a use of such land distinct from park purposes, notwithstanding a declaration by council that such wharf use is not inconsistent with park use. 225.

WIDOW—

Election by a widow to take under the will of her deceased husband does not preclude her inheritance of lands as to which her husband dies intestate and to which no reference was made in his will. 124.

The effect of refusal to take under will of her husband is to accelerate the remainder, when. 506.

It is the duty of a widow as the heir or next of kin of her deceased husband to dispose of his body in a reasonable and sanitary manner, and where in conformity with his expressed desire she elects to cremate his body injunction will not lie against cremation, where based only on sentimental objections by other relatives. 619.

WILLS—

Election under, by widow—see Widow.

Where a testamentary trustee is vested with discretion as to the use of some portion of the princi-

pal in maintaining the ward, he is under the exclusive jurisdiction of the probate court with reference thereto. 141.

The election by a widow to take under the law, rather than under the will of her late husband, which bequeathed to her for life the entire income of his estate from every source derived, accelerates the remainder and causes it to vest at once in accordance with the terms of the will. 506.

Where a testator had no children at the time of executing his will and has made clear that his will shall apply to unborn children, it is not for the court to inquire whether such provision was large or small, equal or unequal, vested or contingent, present or future. 593.

WITNESS—

A recusant witness before a notary public can not be punished by the notary for contempt, when the commission under which the notary is acting comes from another state. 161.

WOMEN—

A woman serving as matron of a jail is not a public officer, and

can not become a public officer under our present Constitution. 659.

WORDS AND PHRASES—

Term "livery hire" construed. 61.

Meaning of the phrase "any opening of the body" as used in the statute relating to sodomy. 349.

Meaning of the words "front foot," under the provisions of 101 O. L., 134. 364.

Meaning of the words "gross receipts" as used in the act providing for the collection of an excise tax from public utility corporations. 570.

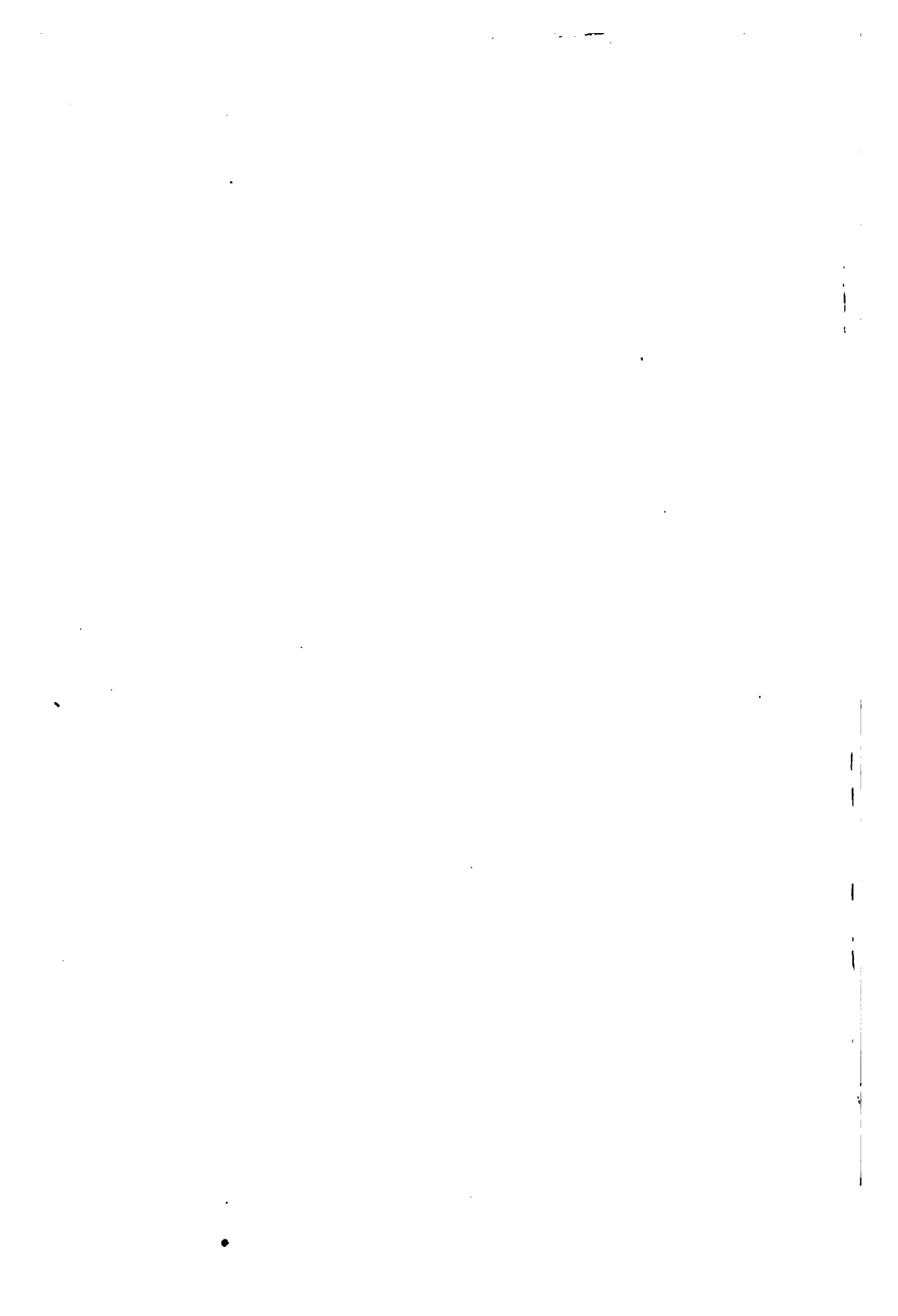
Meaning of the phrase "correctional power" as used in the statute relating to mobs. 673.

The word "and" can not be read "or" in the phrase "assaulted and lynched" as used in Section 6281, General Code. 673.

WORKSHOPS AND FACTORIES

Injunction does not lie to protect from arrest a baker who has refused to obey an order to remove his bakery from underground. 298.

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